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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA.

JANUARY TERM, 1874.

TAZEWELL L. HARGROVE,
REPORTER.

ANNOTATED BY
WALTER CLARK.

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NORTH CAROLINA,

JANUARY TERM, 1874.

JOSIAH TURNER, Jr., v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

1. A complaint seeking to charge the lessee of the North Carolina Railroad with damages for refusing to transport the complainant, to whom the lessor of said road had issued a free pass for life, not alleging any obligation on the part of the lessee, by contract or otherwise, to carry the complainant over the road free: *Held* to be bad on demurrer, and that the Judge below was right in dismissing it.

2. The free pass given by the lessor, the North Carolina Railroad Company, was only a license, without any consideration in law, which that company could revoke at pleasure, and did revoke by leasing the road to the defendant.

Civil action for damages, tried before *Tourgee, Judge*, at Fall Term, 1873, Superior Court of Orange.

In his complaint filed at Spring Term, 1873, the plaintiff alleges:

1. That having been President of the North Carolina Railroad Company, the by-laws of that company entitled him to a free pass for life over the line of said company's road.

2. That at the annual meeting of the stockholders of said

company, held at Salisbury in July, 1869, the stockholders voted a free pass to himself and family for life.

3. That in 1871, the said North Carolina Railroad was leased to the Richmond and Danville Railroad Company, the defendants, without authority of law, and passed into the hands of said company, which was afterwards, in July, 1872, confirmed by the stockholders of the North Carolina Railroad Company, in their annual meeting at Raleigh, N. C.

4. That the plaintiff used said pass, or ticket for life, until February, 1872, when the conductors, agents of said defendants, refused to recognize it.

5. That in February, 1872, W. W. Davies, a conductor of a train of cars belonging to the said company, upon the line of the North Carolina Railroad, an agent of the said Richmond and Danville Railroad Company, demanded of the plaintiff his fare from Raleigh to Hillsboro, to which point he intended travelling upon the cars, which the plaintiff refused to pay, and offered to exhibit to the agent Davies, the conductor, the pass aforesaid, which the conductor, the agent of the defendant, refused to recognize, stopped the train and ejected the plaintiff from the cars.

6. That shortly afterwards the plaintiff attempted to travel upon the said line of road to and from the points aforesaid, upon the pass aforesaid, and was again ejected from the cars by conductor Spraggins, an agent of the defendant; on two several occasions he was made to pay his fare by conductor Spraggins, the agent of the defendant, to prevent his being ejected from the train, to the great damage of the plaintiff.

Wherefore the plaintiff demands judgment for $10,000, etc.

(3) At the same term the defendant's attorneys, Graham & Graham, demur to the complaint and move to dismiss the action, for the reason that the complaint does not state facts sufficient to constitute a cause of action, in that—

1. It does not allege that the lease imposed upon the defendant any liability for contracts of the lessor.

2. It does not allege that the defendant is a corporation, or liable to be sued.

3. It does not allege any consideration for the pass stated to have been given by the North Carolina Railroad Company

to plaintiff, it having been admitted by the attorney for the plaintiff that no such by-laws as alleged ever existed, and said pass was *nudum pactum.*

4. That no contract to transport plaintiff is alleged to have arisen against the defendant.

5. That the allegation that the lease is without authority of law bars the action against the defendant.

6. There is no allegation that the North Carolina Railroad Company is a corporation.

Upon consideration the Court sustained the demurrer, and gave judgment, as follows:

This action coming on for hearing upon the motion of defendant's counsel to dismiss the same for want of allegations sufficient to constitute a cause of action, after argument of counsel it appears to the Court that the motion is well founded, in that the complaint does not anywhere set forth or allege—

1. That the lease under which the defendants hold imposed upon them the duty of fulfilling and carrying out this or any other contract of the lessors of the North Carolina Railroad.

2. The said complaint does not anywhere allege that the defendants are a corporation and liable to be sued under the name and style by which they are therein designated.

3. That the pass upon which the plaintiff claims the right to transportation over the road and in the cars of the defendant was issued for a valuable consideration.

4. That there is no allegation of any contract, express or implied, between the plaintiff and the defendant
requiring them to transport the said plaintiff over (4)
their road, or in their cars, without consideration.

5. The complaint alleges that the defendant was in possession of the North Carolina Railroad without authority of law; which, if true, would relieve the defendant of all liability in the premises, and remit the plaintiff to an action against the North Carolina Railroad Company to obtain his remedy. If the lease was without authority of law, it could impose no responsibility upon the lessee to fulfill the contracts of the lessors, even though expressly stipulated therein.

6. That there is no allegation that the North Carolina Railroad Company is or was a corporation or individual having

power to make such contract or grant, as is set forth in the complaint.

It is therefore ordered that the said action be dismissed, and judgment rendered against the plaintiff and his sureties for the costs thereof.

From which judgment the plaintiff appealed.

No counsel for appellant in this Court.
J. W. & J. A. Graham, contra.

(5) RODMAN, J. It is unnecessary to consider all the several grounds of demurrer stated by the defendant, for if any one of them is good it disposes of the action.

I take the fourth ground, to-wit: That the complaint does not allege any obligation on the part of the defendant, by contract or otherwise, to carry the plaintiff over its road free. The existence of such an obligation is a necessary part of the plaintiff's cause of action and should have been distinctly alleged. No contract is alleged with the defendant. It may be that it was intended to allege such an obligation as arising out of the free pass for life given by the stockholders of the North Carolina Railroad Company to the plaintiff, but it is not alleged that the defendant company became bound by the contract of the North Carolina Company. If it was so bound, the free pass given by the North Carolina Company was only a license without any consideration in law, which the company could revoke at pleasure and which it did revoke by leasing its road to the defendant. It is immaterial for the present purpose whether the lease was a valid and lawful one or not. For even if it were not so, the defendant was actually in the possession of the road and franchises of the North Carolina Company, and the legality of its possession cannot be disputed collaterally, but only by a direct proceeding for that purpose.

There is no error. The case may be remanded on motion of plaintiff so that he may amend, otherwise the judgment is affirmed.

PER CURIAM. Judgment affirmed.

THE NORTH CAROLINA RAILROAD COMPANY v. JAMES G. MOORE and others.

The North Carolina Railroad Company, as well by its charter, Acts of 1848-'49, chap. 82, and the supplemental acts thereto, as upon general principles, has the power to deposit or loan its surplus funds, and of course may bring the necessary actions to recover the sums loaned.

CIVIL ACTION to recover the amount of a bond, tried before *Tourgee, Judge,* at Fall Term, 1873, Superior Court of ALAMANCE.

The plaintiff, a corporation created by the law of the State on 23 August, 1870, loaned the defendants the sum of $1,500, taking from them a bond or covenant in the words following, to-wit:

"$1,500. Sixty days after date, we, or either of us, promise to pay to the Treasurer of the North Carolina Railroad Company the just and full sum of fifteen hundred dollars, for money borrowed at eight per cent. interest. Witness our hands and seals, this 23 August, 1870.

"J. G. MOORE, (*Seal.*)
"J. A. MOORE, (*Seal.*)
"R. D. WADE. (*Seal.*)"

In their answer the defendants admit the execution of the bond and for a principal defense deny the capacity and power of the company to lend money and recover it by an action on a bond.

It being submitted to the Court, His Honor upon consideration gave judgment in favor of the plaintiff for the balance due on the bond, $947.70 (the defendants having paid $600 thereof on 16 March, 1871) and interest and costs.

From this judgment defendants appealed to this Court.

Parker, for appellants.
Boyd, contra.

SETTLE, J. The defendants borrowed money of the plaintiff and gave their bond therefor, but now seek to avoid the payment of the same by alleging the incapacity of the plaintiff to make such a contract or to enforce it in the Courts.

A corporation can do no act which is prohibited by its charter, or which is against the general law of the land; and as Mr. Dillon says, "it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard." But the charter of the North Carolina Railroad Company, Acts 1848-'49, ch. 82, is a very liberal one. It enacts that the company shall have the power of "purchasing, holding, selling, leasing and conveying estates, real, personal and mixed, and acquiring the same by gift or devise as far as shall be necessary for the purposes embraced in the scope, (9) object and interest of their character, and no further, * * * and shall have and enjoy all other rights and immunities which other corporate bodies may or of right do exercise; * * * and may borrow money, make mortgages," etc.

We think it clear from these large and liberal grants of power as well as upon general principles that the plaintiff may deposit or loan its surplus funds without subjecting itself to the losses which would follow upon the establishment of the principle contended for by the defendants. *McFarland v. Ins. Co.,* 4 Denio, 392; *Potter v. Bank,* 5 Hill, 490, and 7 Hill, 330; *Association v. Pribben,* 48 Mo., 37.

It is not alleged or pretended that the plaintiff is engaged in the business of banking; but so far as appears to us this was only a single transaction by way of investing surplus funds. The case pressed upon the argument to defeat this recovery was *Ins. Co. v. Scott,* 19 Johnson, 1, in which it is held that the security there given was void, being in contravention of the general banking act of the State of New York. But upon review of this case in the Court of Errors it is held that the Ithaca Insurance Company may loan their surplus funds on bond, note or mortgage. *Ins. Co. v. Scott,* 8 Cowen, 709. In *Frye v. Tucker,* 24 Ill., 180, the Court say "that a railroad company can take a promissory note and negotiate it in the ordinary course of their business cannot be questioned. It is a power inherent in all such corporations."

The judgment of the Superior Court is affirmed.

Per Curiam. Judgment affirmed.

STATE on the relation of W. R. COX, Solicitor, v. NICHOLAS PEEBLES, guardian, and others.

1. Confederate money taken in good faith should be received at its scaled value in all fiduciary transactions: *Therefore,* a guardian who paid the taxes due from his ward's estate with his own Confederate money can only receive credit for the value thereof according to the legislative scale.
2. Good faith requires that any profit which arises from a transaction of the guardian in the management of the ward's estate must be for the benefit of the ward and not of the guardian.

CIVIL ACTION on a guardian bond and for the removal of a guardian, tried before *Albertson, Judge,* at Fall Term, 1873, NORTHAMPTON Superior Court.

During the pendency of the suit it was referred to a commissioner to state an account between the guardian and his ward, who at Fall Term, 1873, reported the stated account.

The guardian, one of the defendants, and the other defendants, sureties on his guardian bond, filed exceptions to the report of the referee or commissioner for the reason that he had credited in the account the scaled value of certain moneys paid by the guardian in 1862, '63 and '64 for his ward instead of allowing the whole amounts of such several payments.

His Honor overruled the defendants' exceptions, confirmed the report of the referee, and gave judgment for the amount stated to be due. From this judgment defendants appealed to this Court.

Barnes, for appellants.
Busbee & Busbee, contra.

SETTLE, J. Should a guardian who paid the taxes on the estate of his ward during the war, out of his (the guardian's) own Confederate money, be allowed in a settlement with his ward the full amount of such payments, or should they be scaled to the value of the Confederate money so paid?

Had the guardian received in good faith Confederate money for his ward before it became so depreciated as to amount to notice that it would not be received, he would have been liable only for the value of the Confederate money at the time of its receipt. With this principle another goes hand in hand, to-wit, that where the guardian used his own Confederate money in the payment of debts against his ward, he should be allowed only the value of such money. To hold otherwise would violate the fundamental principle that a guardian shall not be allowed to speculate upon the estate of his ward.

Good faith requires that any profit which flows from a transaction of the guardian, in respect to the ward's estate, must be for the benefit of the ward and not for the guardian.

The spirit of our decision is that Confederate money taken in good faith should be received at its scaled value in all fiduciary transactions, and indeed in all transactions except where the parties dealt directly with each other and at arm's length; as, for instance, where a debtor tenders and a creditor receives Confederate money in payment of a debt, each dealing *suo jure.* In such case we have held that the payment amounts to a discharge of the debt.

The judgment of the Superior Court is affirmed.

Per Curiam. Judgment affirmed.

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(12)

JAMES McLIN v. CITY OF NEW BERN.

The Act of 1791, chap. 31, sec. 1, empowering the Commissioners of the city of New Bern to levy taxes, among other specific purposes, "for such other good purposes as the said Commissioners may judge necessary," and the act of the special session of 1866, chap. 4, sec. 3, empowering the Mayor and Council of said city, "by all needful ordinances, rules and regulations to secure order, health and quiet within the same, and for one mile around," confer on the municipal authorities sufficient power to repair and build guard houses or jails.

(The case of *Smith v. New Bern, post,* page 14, cited and approved).

Civil action, tried before *Clarke, Judge,* at Fall Term, 1873, Craven Superior Court.

The case as settled by counsel and transmitted with the record to this Court is as follows:

This was a petition for an alternative *mandamus,* granted by his Honor *Judge Clarke,* at the Fall Term, 1871, of said

Court, to compel the Mayor and Board of Councilmen of said city to levy a tax to pay a certificate of indebtedness issued by said city to McLin & Wood and assigned to plaintiff, a copy of which is as follows, to-wit:

"No. 17.

"OFFICE OF THE BOARD OF COMMISSIONERS,
"NEW BERN, N. C., 31 January, 1866.

"This is to certify that the town of New Bern is indebted to McLin & Wood in the sum of three hundred and thirty-one dollars and twenty-seven cents, as per account audited and approved by the Mayor and Board of Commissioners.

"J. T. HOUGH, *Mayor.*

"Registered folio 2, page 2.

"JOHN M. HARGETT, *City Clerk.*"

Upon cross-examination the plaintiff admitted that the said certificate was issued in payment of certain (13) articles specified in the bill annexed, marked "A." This evidence was objected to by plaintiff but admitted by the Court.

Among the articles charged are the following: * * * which were rendered for the purpose of repairing a city jail or guard house, which had been turned over by the military to the municipal authorities.

Defendant asked his Honor to charge that the city had no power under the charter to repair a jail or guard house, and that plaintiff could not recover for value of said gratings. This was refused, and his Honor charged that it was for defendant to show that it had no such power and that said certificate was improperly issued.

Verdict and judgment for plaintiff. Rule for a new trial granted and discharged. Appeal by defendant.

Defendant alleges that his Honor erred in refusing the instructions asked by defendant's counsel, and giving those above set forth.

Seymour, for appellant.
No counsel *contra* in this Court.

Bynum, J. This case is governed by that of *Smith v. New Bern, post,* 14.

In a city of the commercial character and population of New Bern, it would be difficult and extremely inconvenient duly and efficiently to administer the public powers and ordinances of the corporation without the aid and benefit of a guard house or jail. In addition to the section of the charter set forth in the opinion before referred to, chapter 31, section 1, Acts of 1791, being "An act for the further regulation of the town of New Bern," vests in the corporation the power to levy taxes for specific purposes, "and for such other good purposes as the said commissioners may judge necessary"; and chapter 4, section 3, acts of the special session of 1866, to recognize the government of the city of New Bern, (14) vests in the mayor and council the power "by all needful ordinances, rules and regulations to secure order, health and quiet within the same and for one mile around."

It would therefore seem that these several provisions for the good government of the city confer sufficient power to build a guard house, and certainly to repair and preserve one already built, as is the case here.

His Honor was asked by the defendant to instruct the jury that the plaintiff could not recover because the city had no power under the charter to repair the jail or guard house, which instruction his Honor refused to give, but charged the jury that it was for the defendant to show that it had no such power, to which charge the defendant excepted.

As the verdict and judgment were for the plaintiff, and as in law he was entitled to recover, no exception to the charge can avail the defendant.

Per Curiam. Judgment affirmed.

Cited: Wadsworth v. Concord, 133 N. C., 59.

ANN L. SMITH, endorsee, v. CITY OF NEW BERN.

The Board of Commissioners of the town of New Bern, under the act of their incorporation, and the acts amendatory thereof, have the power to build and repair a market-house.

CIVIL ACTION, tried before *Watts, Judge,* at the January (Special) Term, 1873, Superior Court of CRAVEN.

The plaintiff, who is the assignee of Smith & Dey, sues the defendant upon the following instrument, to-wit:

"No. 3.

"OFFICE OF THE BOARD OF COMMISSIONERS,
"NEW BERN, N. C., 31 January, 1866.

"This is to certify that the town of New Bern is indebted to Smith & Dey in the sum of nine hundred and thirty dollars and fifty-eight cents, as per account, and (15) approved by Mayor and Board of Commissioners.

"$930.38. J. T. HOUGH, *Mayor.*

"Registered 1 February, page 1.
"JOHN M. HARGETT, *City Clerk.*"

The only question arising in the case is whether under the charter and laws of the town of New Bern the municipal officers had authority to contract for building a market-house.

It was submitted to the jury, who finding in favor of the plaintiff, a judgment was rendered accordingly, and defendant appealed.

Seymour, for appellant.
Lehman, contra.

BYNUM, J. This is a civil action against the defend- (17) ant, a municipal corporation, to recover the sum of $930.58 due by audited account for building a market-house in and for the use of the city of New Bern. There was a verdict and judgment thereon for the plaintiff in the Court below and an appeal to this Court.

The case stated presents for our decision but one question, viz.: Whether the city of New Bern had the power to build a market-house under the laws of the corporation.

For the power the plaintiff relies upon section 13, chapter 25, Acts 1779, being an act for the regulation of the town of New Bern and for other purposes, which, after enumerating other powers conferred upon the commissioners not material to our case, proceeds thus: "And shall have power, (18) from time to time, and for all time hereafter, under their common seal, to make such rules, orders, regulations and ordinances as to them shall seem meet for repairing the streets, erecting public wharves, *appointing market places* and regulating the same, erecting public pumps and repairing the same, appointing town watches or patrols and making proper allowances for such services, and for all such other necessary ordinances, rules and orders which may tend to the advantage, improvement and good government of said town; and the same rules, regulations and ordinances from time to time to alter, change, amend or discontinue, as to the said commissioners, or a majority of them, shall appear necessary and best answer the purposes intended for regulating and governing said town."

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in *express words;* second, those *necessarily or fairly implied in* or *incident to* the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation. Dillon Mun. Corporations, sec. 55; *Spaulding v. Lowell,* 23 Rich., 71, 74.

Our case seems to fall within the second class, for conceding that the power of "appointing a market place and regulating the same" is not an express power to build, yet it is fairly implied, because a market-*house* is reasonably necessary and conducive to the employment of the market *place.*

"*Market,* a public place appointed by public authority, where all sorts of things necessary for the subsistence or for the convenience of life are sold." Bouv. L. Dict., Tit. Market. "*Market* is taken for the place where kept." Lovel L. D., Tit. Market. A "market place" does not necessarily or usually mean an uncovered space of ground dedicated as a market, but a market-house, just as we say "Monmouth place," meaning the building, or as we call a residence and its grounds "a fine place."

All corporations derive their powers from legislative grants and can do no act for which authority is not (19) expressly given or may not be reasonably inferred. But if we say they can do nothing for which a warrant could not be found in the language of their charter, we deny them, in many cases, the power of self-preservation, as well as many of the means necessary to effect the essential object of their creation; hence they may exercise all the powers within the fair intent and purpose of their creation which are reasonably necessary to give effect to powers expressly granted, and in doing this they must have the choice of means adapted to ends and are not confined to any one mode of operation. *Bridgeport v. Railroad Co.,* 15 Conn., 475, 501. Here the power is granted in express terms "to make all such necessary ordinances, rules and orders as may tend to the advantage, improvement and good government of the town," thereby vesting in the corporation the *discretion* as to the measure and mode of exercising the powers conferred. Under the powers before recited, and as incident thereto, the city of New Bern unquestionably has power to provide suitable accommodations for the transaction of the business of the corporation, as to build a *town-house. French v. Quincy,* 3 Allen, 9; *People v. Harriss,* 4 Cal., 9. So, as a sanitary regulation, the city has power to procure a supply of water, as to bore an *artesian well. Livingston v. Pippen,* 31 Ala., 542; *Rome v. Cabot,* 28 Ga., 50. So, to preserve the cleanliness and salubrity of the city, it may erect *public hospitals. Milne v. Davidson,* 5 La., 410. And for public health, convenience and comfort it may regulate burials, as by establishing *cemeteries. City Council v. Baptist Church,* 4 Strob., 306. It has power to abate and remove *livery stables, slaughter-houses, gas-works, powder-houses, bawdy-houses* and the like, when, in the exercise of a fair discretion, they are deemed a nuisance to the town, as shown by innumerable cases.

It is not necessary that incorporated cities should have power by express grant to build a market-house. Thus it has been held that a town having authority to make by-laws for managing and ordering its "*prudential* affairs" has power to appropriate money for the erection of a mar- (20) ket-house and raise the amount by taxation. *Caldwell v. Allen,* 33 Ill., 416; 23 Mich., 344; *Spaulding v. Lowell,* 23 Peck., 71. So, power to "establish and regulate markets," as a necessary incident, authorizes the purchase of ground whereon to erect the building. 14 N. Y., 356.

It may be that at the time of this grant, in the rude beginning of society in this country, the immediate erection of a market-*house* was not within the means of the corporation or intended by the grant any more than the costly structures which now adorn American cities under similar grants; but as population, wealth and refinement advance, public decency, comfort and convenience require the exercise of those reserved powers of the charter "to make all such necessary ordinances, rules and orders as may tend to the advantage, improvement and good government of the town."

PER CURIAM. Judgment affirmed.

Cited: Wade v. Newberry, 77 N. C., 481; *Greensboro v. McAdoo,* 112 N. C., 367; *Edgerton v. Water Co.,* 126 N. C., 97; *Wadsworth v. Concord,* 133 N. C., 598.

CALVIN J. and ASA GREEN v. VERBIN CASTLEBURY.

There are three modes of trial provided for by The Code:

1. Trial by jury.
2. Trial by the Court.
3. Trial by referees.

1. If a reference is made by consent it is a mode of trial selected by the parties and is a waiver of the right of trial by a juay.

2. If no exceptions be taken before the referees and their report go up without exceptions and either party desire to except, then and there in term time, he must be permitted to do so. And then his Honor must pass upon them as if they had been taken before the referees.

(21)

3. Where a report is made under a compulsory reference, and exceptions are filed, and issues made by these exceptions, either party has the right to have the issues tried by a jury; because, not having waived a trial by jury, as is done when the reference is by consent, the party has a constitutional right to a trial by jury.

4. Section 246, C. C. P., construed, and the practice under the same settled and fully explained.

CIVIL ACTION for the dissolution of a copartnership, and account, and appointment of a receiver, tried before *Tourgee, J.*, at Fall Term, 1873, ORANGE Superior Court.

The following is the case settled and sent up to this Court by his Honor:

"In this action, Calvin E. Parish having been heretofore appointed referee and receiver, and his reports, both as referee and receiver, having been separately filed in accordance with an order and rule of this Court at least ten days before the present term, at this term the plaintiff moved, without notice, to review the report of the referee upon exceptions presented to the Court, and not upon a case made out and settled by the referee. The Court refused to hear the motion to review upon exceptions without notice given in accordance with section 247, C. C. P., last clause, unless it were upon a case stated upon exceptions, as provided in sections 146 and 142, C. C. P. In this connection I would call the attention of the Supreme Court to what I am satisfied is a misprint in section 242. The words used in that section are 'a case or exceptions' and 'a case or exception,' both of them evidently designed to have been 'a case *on* exceptions,' as a reference to the kindred provisions under appeals will disclose.

"The plaintiff in this case having given no notice of the motion to review, and failing to submit a case settled by the referee upon exceptions taken before him at the trial as required, the Court is of opinion that under section 246 the report of a referee cannot be reviewed except upon a case stated. This section provides that the decision may be excepted to and reviewed in like manner and with like effect in all respects as in cases of trial by the courts. (22) This can only be by case stated. This seems to be the more reasonable from the fact that the referee is not required nor expected to report the evidence nor file any account of the trial had before him beyond his findings. How, then, shall the Court know what was done before the referee, what exceptions taken, what rulings made, what evidence received, except upon a case made up before him? For these reasons the Court refused to hear the exceptions or allow them to be filed in the case, and ordered the report of the referee to be confirmed."

From this order the plaintiffs appealed.

Battle & Son, for appellants.
(23) *J. W. & A. W. Graham*, for defendant.

READE, J. There are three modes of trial provided for in The Code: 1, trial by jury; 2, trial by the Court; 3, trial by referees.

The mode of trial by referees is under review in the case before us. If the reference is by consent, then that is the mode of trial selected *by the parties*, and is a waiver of the right of trial by jury. So that at no part of the proceedings is either party entitled as a matter of right to have a jury.

The mode of trial by referees is found in section 246, but it is not very plain, and is, therefore, the subject of construction. And we feel at liberty—indeed it is a duty—to give it such construction as will best subserve the convenient administration of justice, as doubtless that was the intention. We have inquired of gentlemen of the bar practicing in different circuits, and the practice is not uniform; and the views of his Honor do not precisely accord with ours. It is important that the practice should be *settled*, and therefore we proceed to declare what it shall be:

(24) 1. Notify the parties of the time and place of trial.

2. Examine the evidence and write it down.

3. Find the facts and write them down.

4. Declare the law upon the facts and write it down.

5. If necessary state an account.

6. Render a decision upon the whole case in writing.

7. If either party take exceptions to any part of the proceedings, put the exceptions down in writing and pass upon them, allowing or disallowing.

8. Send up the whole proceedings to the next term of the Superior Court.

9. In the Superior Court, if there be no exceptions sent up by the referees, the Court will confirm the report as a matter of course.

10. If the exceptions be sent up the Judge will review the finding of the referees; and his finding upon the facts will be conclusive and cannot be appealed from. In which case his finding, both of the facts and the law, must be sent up to this Court. But the testimony of the witnesses and other evidence must not be sent up.

11. If no exceptions be taken before the referees, and their report go up without exceptions, and either party desire to except, then and there in term time he must be permitted to do so. And then his Honor must pass upon them as if they had been taken before the referees.

And this last is the matter involved in the case before us. The report was sent up by the referees to the Superior Court without any exception having been taken before the referees, and the plaintiff asked leave to file exceptions in term time, and his Honor refused: first, because they ought to have been filed before the referees; and, secondly, because no notice had been given.

We have said above that exceptions may be taken before the referees, and it is best for some reasons that it should be done. For instance, it calls the alleged error to the attention of the referee and enables him to correct it, if he should find it to be an error, and thereby saves time, (25) trouble and cost. But on the other hand, it requires the attendance of counsel before the referee, which may be inconvenient and expensive. So that we hold that it may be done either before the referees or before the Court after the report is returned, at the option of the parties.

His Honor was of opinion that not only must the exceptions be taken before the referee, but the referee must make up a case *on* the exceptions and send up his case to the Superior Court. He thinks so, because section 246 provides that the "decision of the referee may be excepted to and reviewed in like manner and with like effect in all respects as in cases of appeal under section 242, and they may in like manner settle a case or exceptions."

The section referred to, 242, provides that when the trial is by the court there may be an appeal "in the same manner and with the same effect as upon a trial by jury," and it prescribes how the appeal is to be taken and the case made up for the Supreme Court. The main object of section 242 is to declare that the trial by the Court shall not be conclusive; but that just as an appeal lies when the trial is by jury, so an appeal lies when the trial is by the Court. And so section 246 provides that just as trial by jury and trial by the Court are not conclusive, so trial by referees shall not be conclusive but may be reviewed by the Judge. The section prescribing how an appeal shall be taken and the details about making up the case for the Appellate Court is not 242 nor 246, but 301.

But if section 242 is to be construed as prescribing the details of how the case is to go up from the referees to the Judge, then his Honor is mistaken in supposing that the *referees* are to make out a *case* on the exceptions, because what is said in that section is that "either *party* may make a case on exception." It is true that in the same section it is also said "that the Judge in settling the case," etc., which shows that the language is inaccurate, caused probably by the fact that the mere manner of making up the case was not the subject of the section, but the right of appeal was. This (26) mistake of his Honor probably led into the other mistake, of supposing that "case or exceptions" was a misprint for case *on* exceptions.

We think his Honor was also mistaken in supposing that ten days' notice before Court of the intention to file exceptions at Court was necessary. Of course it was not necessary to give ten days' notice of the intention to file exceptions, if his Honor was right in supposing that exceptions could not be filed at all. Why give notice of an act which cannot be done? And yet it is true that section 247 does provide that "the report of the referees shall be made to the Clerk, etc., and either party, after ten days' notice to the adverse party, may move the Judge to review such report," etc. But observe that this was intended for that state of things provided for by the Code, that the Clerk was the Court, and the Court was always open; and but for this provision the party in whose favor the report was might move the Clerk for its confirmation, and so notice was necessary in order that the case should come before the Judge; but as that is changed, and the report is now made in term time, and *must* be passed upon by the Judge, and as both parties are present in term time, there is no need of notice.

What has been said is in reference to trial by referees where the reference is by consent. The practice must be the same in compulsory references, except that when a report is made under a compulsory reference and exceptions are filed and issues made by the exceptions either party has the right to have the issues submitted to a jury; because, not having waived a jury trial, as is done when the reference is by consent, the party has a constitutional right to a trial by jury. And so in a case where the reference is by consent, if issues arise on exceptions which the Judge is unwilling to try himself he may order a jury to find the issue to aid him, but it is not a *right* which the party has.

There is error. This will be certified, to the end that exceptions may be filed, etc.

PER CURIAM. Judgment reversed.

Cited: Cain v. Nicholson, 77 N. C., 412; *Atkinson v. Whitehead, Ib.,* 419; *Lawrence v. Hyman,* 79 N. C., 21; *Grant v. Reese,* 82 N. C., 74; *Barcroft v. Roberts,* 91 N. C., 366; *Barbee v. Green,* 92 N. C., 475; *Carr v. Askew,* 94 N. C., 211; *Mizell v. Simmons,* 79 N. C., 193; *Cooper v. Middleton, Ib.,* 93; *Battle v. Mayo,* 102 N. C., 435, 437; *Chard v. Warren,* 122 N. C., 79; *Holt v. Johnson,* 128 N. C., 68.

STATE on the relation of H. B. ARMFIELD and another v. JOHN D. BROWN and others.

In a case of a compulsory reference either party may, at some stage of the proceedings, to be determined by the Court, demand a trial by jury of the issues arising in the report of the referee. But if the reference has been made by consent, the parties waive their right to have such issues tried by a jury, and cannot demand it after having by such waiver renounced it.

RODMAN, J., dissenting.

CIVIL ACTION, suit on defendant's bond as guardian of plaintiffs, heard before *Cannon, Judge,* Fall Term, 1873, ROWAN Superior Court.

The case was referred at Fall Term, 1869, to James E. Kerr to state an account, etc., and on 9 August, 1873, the report of the referee was returned. At Fall Term, 1873, the defendants excepted to the report of the referee, and filed in Court the following notice, which had been served, as stated:

"State, upon the relation of H. B. and M. S. Armfield,

against

John D. Brown and others.

"*To Messrs. Craige & Craige and McCorkle.*

"GENTLEMEN:—Take notice that we shall, on the calling of the above case, move the Court to submit as an issue of fact to the jury the question of diligence or negligence of the defendant John D. Brown, arising out of the matters in controversy in the above-named suit, under the Act of 1866-'67, chap. 59, sec. 2.

"Very respectfully,
"BAILEY & HENDERSON,
"*Attorneys for defendants.*"

"Served 16 October, 1873, by delivering copy of notice to Craige & Craige.

"C. F. WAGGONER, *Sheriff.*"

(28) Defendants moved that such issue be made up and submitted to the jury. His Honor refused the motion on the ground that the notice was served too late.

From this judgment of the Court, the defendants appealed.

Bailey and *Fowle,* for appellants.
McCorkle, Craige & Craige and *Jones & Jones, contra.*

BYNUM, J. This was a civil action upon a guardian bond. Upon complaint and answer at Fall Term, 1869, there was a reference for an account. After taking proofs and hearing the parties, the referee made his report at Fall Term, 1873, when exceptions were filed by the defendants, who at the same time, upon due notice, demanded a trial by jury upon the question of diligence, pursuant to chapter 59, section 2, of Acts of 1866-'67. This being refused by the Court, upon the ground that the notice was served too late, the defendants appealed. So the question to be determined is, were the defendants, as a matter of right, at that time, entitled to a jury trial under the said act, or otherwise.

1. The act above cited was passed before the adoption of the present Constitution, under which we have taken a new departure both in legislation and the modes of procedure in the trial of actions. Chapter 201 of the Acts of 1868-'69, revises and consolidates all the statute laws of the State upon the subject of guardian and ward, as chapter 113 revises and re-enacts the whole body of our statute laws concerning executors and administrators and the settlement of their estates. These acts are embodied in Battle's Revisal, chaps. 45 and 53, but the act relied upon by the defendants is omitted, thus confirming our legal conclusion that chapter 59, Acts of 1866-'67, is repealed by the Acts of 1868-'69 and chapter 121, section 2, Bat. Rev., which declares that all acts theretofore in force, the subjects of which are digested and compiled in the Revisal, are repealed, with certain exceptions not affecting this case.

2. Assuming, therefore, that the defendants cannot claim a jury trial under the Act of 1866-'67, are they (29) entitled to the remedy they ask under any other provision of the law?

The claim of the defendants to a jury trial is next founded on the Constitution of the State, Art. XI, sec. 18 of which provides: "that in all issues of fact joined in any court the parties may waive the right to have the same determined by a jury, in which case the finding of the Judge upon the facts shall have the force and effect of a verdict of a jury."

The right of jury trial here secured is not absolute, but *sub modo,* that is upon all *issues joined,* the meaning of which term can only be ascertained outside of the Constitution and in the legislation since to secure the benefit of this provision of the Constitution.

By title 10, section 219, C. C. P., it is seen that the issues arise upon the pleadings, and if they are issues of law they are to be tried by the Court, but if they are of fact, by section 224 they are to be tried by a jury, unless a jury trial is waived. When issues of fact are thus made up and joined by the pleadings, they stand for trial and must be tried in one of two ways, either by the jury or by the Court, as is manifest by section 229. When, therefore, sections 244 and 245 provided for a *reference,* these two sections are to be collated with section 229 and Art. IV, section 18, of the Constitution of the State, from which it will be seen that the trial by reference is ancillary only to the reference to the Court, and the finding of the referees when revised and completed pursuant to sections 246 and 247 becomes the finding of the Court, from whose judgment thereon the appeal lies to this Court.

There are three modes of waiving a jury trial: 1, by default; 2, by written consent; and 3, by oral consent, entered on the minutes of the Court. Supposing these modes of the waiver of a jury trial were not merely directory but essential, it would yet seem that a reference appearing of record is the highest evidence of waiver, and cannot be questioned without impairing the value and due order of judicial proceedings. When the record shows that a reference (30) has been made, it imports that every condition has been complied with necessary to make it effectual, and confers upon the Court all the rights and duties conferred upon a jury. In the exercise of this power the Court below may revise and correct its own findings, and to that end may invoke the aid of a jury in matters of doubt and conflicting evidence, and it may direct a jury to find either a general or special verdict upon all or any of the issues or upon any particular question of fact, all of which findings shall be written and entered of record. Section 233. The issues having been tried and the facts found, the judgment of the Court is rendered thereon. The mode of appeal is substantially the same whether the trial is by jury, by the court, or by referees, and in either case the facts are found, the case settled and the argument here is confined to the exceptions of law taken, which are filed as a part of the case. There can be but few cases where it can be necessary or proper to set forth any of the evidence in a case settled for this Court. One instance is where exceptions are taken in the trial to the admissibility of evidence, in which case the excepton is made a part of the case with so much of the evidence as may be material to the question to be raised. C. C. P., section 236. Another instance would probably be the finding of a material fact by the Court which is unsupported by *any* evidence. With these and perhaps a few other rare exceptions, this Court, even if disposed to, cannot look into the voluminous evidence which often encumbers the transcript of appeal.

3. But suppose a reference is *compulsory,* as provided for in certain cases specified in C. C. P., section 245, is the right of jury trial thereby lost? We think not, because the right of trial by jury is a constitutional one, and a reference, under the Code, is not *ex vi termini* a waiver of this right, which can be lost by consent only. Such a construction must therefore be given to this section of the Code as will be consistent with the jealous watchfulness of the Constitution over the right of trial by jury. The apparent difficulty here grows out of the fact that the distinction between law and equity as to the forms of action is abolished, and the (31) right of trial by jury is now conferred in matters of equity as well as law, thus in a measure incidentally mingling the substance as well as the forms of the two jurisdictions. The usual subjects of a compulsory reference will be, under the new system, matters of equity which were formerly not tried by a jury but which now must be if the party claims the right. There will be cases, those involving complicated matters of account, for instance, where without a reference there would be a failure of justice, and where if the parties refuse consent the reference must be compulsory. In such cases, if demanded, a jury trial must be allowed at some stage of the proceedings; at what period of the trial must be determined by the Court in such way as will be most conducive to the ends of justice and a speedy and final termination of the controversy. In analogy to equity proceedings it may be found most proper to order a jury upon the coming in of the report, when the material issues will be eliminated by the finding of the facts and the exceptions thereto. This discussion, however, is not necessary to the decision of our case, but is closely connected with and grows out of it. In the case before us we hold that the reference was by consent duly given, and that parties after selecting their forum and meeting with an adverse decision will not be allowed, as a matter of right, to turn round and successfully assert a right which they had renounced. The Judge below is not precluded from granting the application in the exercise of his discretionary and revisory powers, and doubtless he will do so in cases of evident wrong and injustice. The law clothes him with that power as a trust, great, it is true, and liable to abuse, but not greater than was possessed by the Judges

under the old system, when they could grant new trials until the verdict conformed to their views. Nay, a Judge now has not as much power as then, for so vigilant and zealous of abuse is the new Code, that section 236 makes express provision for an appeal from all orders granting as well as refusing new trials, in which cases exceptions are to be filed and the cases settled as in the cases of appeal. In the case (32) before us there is but a single item in dispute, and as to that all the facts are found by the referee, and are not controverted by the defendants, thus presenting only questions of law for the Court.

Judgment affirmed and case remanded, to the end that the case be proceeded with according to the course of the Court.

PER CURIAM. Judgment affirmed.

RODMAN, J., dissenting. I dissent from so much of the opinion of the Court in this case as decides that the parties have *a right* to a trial by jury of the questions of fact made by exceptions to the report of a referee upon a compulsory reference. I do not think that this right is given either by the Constitution or by C. C. P. in any case except that of issues joined in the pleadings.

In *Keener v. Finger, post,* 35, it is held upon a misconception, as I respectfully think, of the meaning of the words "issues of fact" in the Constitution, that this Court has no right to review the findings of facts by the Judge below in any case. The logical result was to make the Judge the *sole* and final judge in all such questions of fact as arose otherwise than upon the pleadings. This was an admitted danger, to avoid it it is necessary to hold, as is done in this case, that a party is entitled of right to a trial by jury of questions of fact such as I am speaking of. I think this Court, under its general power to control the practice of the Superior Courts, has a right to require the Judge to submit all such questions to a jury. But I think the rule will be found very inconvenient, if not impracticable, in practice. There is a class of cases, embracing all complicated accounts, which were held from the very earliest times incapable of being heard and properly determined by a jury. While a jury was thought the best and safest tribunal to try one or only a few simple issues of fact, such as were those raised by the pleadings at common law, it was thought obviously inadequate to try the numerous issues arising on a single disputed (33) account, if complicated, or on mutual accounts. These were referred in the common law courts to auditors and in chancery to a master. This long-established practice had its origin in the nature of things, and I fear our experience will show that it cannot be wisely changed. That this decision is necessary to preserve a consistency with that of *Keener v. Finger,* and to avoid the evil to result from that decision, I think is an argument against the decision in that case, since it is found necessary to avoid one evil result by introducing another.

The proper rules I take to be these:

1. Issues of fact (meaning thereby only those made by the pleadings) are *of right* triable by a jury, and no others are.

As to how far a verdict is under the control of the Court there is no question. The rules are well known.

2. The trial of such issues of fact may be waived and given to referees or to the Judge, in which cases the finding has the effect of a verdict.

3. Certain matters may be referred compulsorily. The finding of the referee, both as to fact and law, may be reviewed by the Judge of the Superior Court on exceptions, or on a case settled before the referee, and the findings of the Judge may in like manner be reviewed in this Court.

4. All questions of fact which arise incidentally or otherwise than upon the pleadings, and not on exceptions to a report upon a compulsory reference, such as questions upon a motion to grant or vacate an injunction, to vacate a judgment, amend a record, etc., are triable by the Judge, and his finding *might* be reviewed by this Court. There is no prohibition on this Court to do so by the Constitution or the C. C. P. But it would be inconvenient *in general* for this Court to do so, and *for that reason* it held, before its reorganization in 1868, and has since held, except in the case of injunctions, it would not do so. This class of cases has been so well defined as not often to be mistaken.

Cited: Lippard v. Roseman, post, 34; *Armfield v. Brown,* 73 N. C., 82; *Perry v. Tupper,* 77 N. C., 414; *Atkinson v.*

Whitehead, Ib., 419; *Lawrence v. Hyman,* 79 N. C., 213; *Overby v. B. & L. Asso.*, 81 N. C., 63; *Grant v. Reese,* 82 N. C., 74; *Pasour v. Lineberger,* 90 N. C., 162; *Carr v. Askew,* 94 N. C., 211; *Battle v. Mayo,* 102 N. C., 435; *Nissen v. Mining Co.*, 104 N. C., 310; *Smith v. Hicks,* 108 N. C., 251; *McQueen v. Banks,* 111 N. C., 515; *McDaniel v. Scurlock,* 115 N. C., 297; *Driller Co. v. Worth,* 117 N. C., 518; *Tucker v. Satterthwaite,* 120 N. C., 121.

(34)

STATE on the relation of E. S. P. LIPPARD v. JAMES C. ROSEMAN, administrator, etc., and others.

1. The Act of 1866-'67, chap. 59, sec. 2, is repealed by the Act of 1868-'69 and by chapter 121, Bat. Rev., so that a jury trial upon certain issues cannot, under the provisions of that act, be now demanded.
2. Parties are entitled to a jury trial in all cases when they have not waived their right to demand it, as they have in a reference by consent.

(*Armfield v. Brown, supra,* cited and approved).

CIVIL ACTION, suit on an administrator's bond, heard before *Cannon, Judge,* Fall Term, 1873, Superior Court of ROWAN.

At Fall Term, 1869, the action was referred to James E. Kerr, who returned his report at Spring Term, 1873, at which term exceptions were filed to the report by both plaintiff and defendant. Before the report of the referee was filed the counsel for the defendants served a notice on the plaintiff's counsel that they would move the Court, pursuant to the act of the General Assembly of the session of 1866-'67, chap. 59, sec. 2, to submit the question of diligence or negligence of greater or less degree, which had arisen in the cause, to a jury; and at Fall Term, 1873, the defendant's counsel did move his Honor to make up and submit such issue to a jury, which motion the Court refused on the ground that it was made too late.

From this ruling of his Honor, defendants appealed to this Court.

Bailey and *Fowle,* for appellants.
Craige & Craige, McCorkle and *Jones & Jones, contra.*

BYNUM, J. The facts of this case do not materially differ from those stated in the opinion of the Court in the preceding case of *Armfield v. Brown.*

As we there held that chapter 59, section 2, of the (35) Acts of 1866-'67, by virtue of which a trial by jury was demanded, had been repealed, that case is decisive of this, and for the reason there stated the judgment of the Court below is affirmed.

The case is remanded to be proceeded with according to the course of the Court.

PER CURIAM. Judgment accordingly.

Cited: Lippard v. Roseman, 72 N. C., 428; *Armfield v. Brown,* 73 N. C., 82; *Overby v. B. & L. Asso.,* 81 N. C., 62; *Driller Co. v. Worth,* 117 N. C., 519.

JOSEPH KEENER and others v. DANIEL FINGER and PETER KEENER, administrators.

1. The Supreme Court has no jurisdiction under the Constitution to consider the evidence and review the finding of the Court below in regard to facts, as well as in regard to "legal inference," whether such issues of fact are tried by the Judge or by a jury, or are made by the pleading, as under the old system, or are eliminated by the Court from complaint and answer, or by means of exceptions to a report.
2. That a defendant, an administrator, did not attempt to collect a debt for more than eighteen months after it fell due does not warrant the legal inference of a want of due diligence on his part without a finding of the further fact that the obligors were men in failing circumstances, so as to call for active diligence in the collection, or that the condition of the estate required immediate collection in order to pay off pressing demands and save costs.
3. Nor does it amount to a want of due diligence that the defendant caused a levy to be held up for three years after judgment and then directed the execution to one of the defendants therein which was not kept up and perfected as a lien, unless it is also found that it was for the interest of the trust fund that the debt should have been collected in 1863-'64 in Confederate money, or else that the circumstances were such that the defendant should have taken upon

himself the odium of demanding specie, or that the defendant in the exercise of due diligence should have foreseen the fact that at the close of the war there was to be a military order forbidding the collection of old debts contracted for the purchase of slaves.

(36)

(*Heilig v. Stokes*, 63 N. C., 612; *Klutz v. McKenzie*, 65 N. C., 102; *Hudgins v. White, Ibid.*, 393; *Clegg v. Soapstone Co.*, 67 N. C., 302; *Foushee v. Thompson, Ib.*, 453; *Powell v. Weith*, 68 N. C., cited and distinguished; and *Hill v. Kesler*, 63 N. C., 437; *McKeethan v. Terry*, 64 N. C., cited and approved).

RODMAN, J., *dissentiente.*

CIVIL ACTION, tried before *Logan, Judge,* on exceptions to a report of the Clerk, Fall Term, 1873, Superior Court of LINCOLN.

The plaintiffs as next of kin and distributees of one Michael Keener, bring this suit against the defendants, his administrators, for an account and settlement. The complaint and answer are filed at Spring Term, 1870; at Fall Term, 1870, it is referred to the Clerk to take an account, who, after taking testimony, returns his report to Fall Term, 1871. At Spring Term, 1873, the plaintiffs file ten exceptions to the report of the Clerk, the second of which, being sustained by his Honor on the hearing, and being the only one considered in this Court, is fully stated in the opinion of the *Chief Justice.*

Upon the exceptions filed, the Judge below at Fall Term, 1873, gave the following judgment:

"The whole matter being fully considered, etc., the Court doth find, as to the second exception of plaintiffs, the facts to be: 1. That defendant did not attempt to collect the Baxter note until the Fall of 1862, more than eighteen months after it fell due. 2. That the defendants, by their own orders and acts, caused a levy of execution not to be made until 1866, about three years after the judgment, and then the execution was directed to one of the defendants in the execution and by him levied as set out in the record, and then not kept up and perfected as a lien on the lands of the defendants in the execution so as to secure the debt. 3. That the defendants when they made the settlement of 27 September, 1863, accounted for the Baxter debt and undertook to pay off all the distributees in Confederate money, in full, and retain the said note to themselves; and actually did pay off, tender, or file away Confederate money for said distributees to the full amount of the estate, (37) the Baxter note included.

"Wherefore, the Court doth declare that the defendants have not used proper and due diligence in endeavoring to secure and collect the Baxter debt, and are chargeable with the amount of said debt and interest. The second exception is therefore sustained.

"The Clerk will reform his report in accordance with this opinion, and report the amount due to each of the distributees of the estate out of the sum charged to the administrators as above, to-wit, the amount of the Baxter debt and interest being $2,175 and interest from 21 February, 1861; and judgment is rendered against defendants therefor.

"As the report will be modified and reformed, it is not necessary to pass upon the other exceptions of the plaintiff except as to those of the plaintiffs who have not been paid in full and those for whom defendants set aside Confederate money, as the report sets forth. As to these, the exceptions consistent with this opinion are sustained and the others are overruled. The opinion of the Court is that this Baxter fund shall be applied in the *pro rata* payment of the distributive shares which are unpaid wholly or in part.

The defendants appealed from the foregoing judgment for—

1. His Honor erred in not overruling the exceptions.
2. He erred in holding that defendants were responsible for all the Baxter note.
3. In holding that defendants were responsible for any of it.
4. His Honor ruled erroneously on the facts found and erred in the finding of the facts.

At the time at which the plaintiffs excepted to the report of the Clerk they also demanded a trial by jury as to certain issues, one of which was to the degree and nature of the diligence used by defendants in collecting the said Baxter debt. (38)

Schenck, for appellants.
McCorkle & Bailey, contra.

PEARSON, C. J. On the facts found by his Honor (42) we do not concur in the legal inference "that the defendants have not used proper and due diligence in endeavoring to receive and collect the Baxter debt and are chargeable with the amount of said debt and interest." The case was made up and argued before us on the assumption that this Court had jurisdiction, upon exceptions filed to an account, to go into all of the evidence and review his Honor's finding in regard to the facts, as well as in regard to legal inferences. We are of opinion that the Constitution does not confer such jurisdiction upon this Court; on the contrary, we are of opinion that it is expressly pro- (43) hibited. In *Heilig v. Stokes,* 63 N. C., 612, a distinction is taken between "questions of fact" on a motion for an injunction and "issues of fact," which are conclusive of the case. In *Klutz v. McKenzie,* 65 N. C., 102, it is decided that upon exceptions to the report of a referee stating an account this Court cannot review the finding in the Court below upon the "issues of fact" made by the exceptions. In *Clegg v. Soapstone Co.,* 67 N. C., 302, it is decided that upon a motion to vacate a judgment this Court cannot review the finding of his Honor in the Court below upon the facts. So in *Powell v. Weith,* 68 N. C., 342; *Hudgins v. White,* 65 N. C., 393. We consider this matter settled by the plain words of the Constitution: "The Supreme Court shall have jurisdiction to review upon appeal any decision of the Courts below upon any matter of law or legal inference, *but no issue of fact shall be tried before this Court.*" Art. IV, sec. 11. In *Foushee v. Thompson,* 67 N. C., 453, *Justice Rodman* makes the suggestion that to allow the finding of the Judge below as to issues of fact to be conclusive, and not to be the subject of review, confers upon one man a vast and dangerous power. That may be so, and perhaps the danger is guarded against by another clause in the Constitution which, by plain implication, gives to either party the right to have all issues of fact tried by a jury: "In all issues of fact joined in any Court the parties may waive *the right* to have the same determined by a jury, in which case the finding of the Judge upon the facts shall have the force and effect of a verdict of a jury." Art. IV, sec. 18. If "issues of fact" made by exceptions to the report of a referee in stating an account and the finding of the Judge thereon cannot be reviewed in this Court, which we consider settled, it would seem that such issues, when eliminated by an exception to the report, may be tried by a jury unless the parties waive the right to have the issue tried by a jury. The remarks made by me in *Klutz v. McKenzie* as to the objections to a jury trial in the old "action of account," and my intimation that the (44) parties were not entitled to a trial by jury, were made on consideration of C. C. P. and without advertence to the power of the Constitution, Art. IV, sec. 18, and it stands as an open question. But, however this may be, the words of the Constitution are too plain to admit of discussion or to be refined away by construction. It is ours to interpret the law, not to make it. The manifest purpose of the Constitution is to take from the Supreme Court, as constituted under the new system, the jurisdiction which it had under the old order of things to try all equity cases, both law and fact, upon appeal or by transfer from the Superior Courts. Whether the issues of fact are tried by the Judge in the Court below or by the jury, this Court is expressly prohibited from trying issues of fact, whether made by the pleadings as at law under the old system of pleading, or eliminated from the complaint and answer by the Court directly, or by means of exceptions to an account, as at equity, under the old system of equity procedure. Taking this to be settled, we confine ourselves to the facts found by his Honor and to his legal inference therefrom, and do not feel at liberty to look into the evidence which, without answering any useful purpose, encumbers the papers in this case and will add a large amount of unnecessary costs.

His Honor finds the facts to be: 1. That the defendants did not attempt to collect the Baxter note until the fall of 1862, more than eighteen months after it fell due. Taking this to be so, it does not warrant the legal inference of a want of due diligence on the part of the defendants without a finding of the further fact that "the obligors were men in failing circumstances, so as to call for active diligence in the collection, or that the condition of the estate required an immediate collection of this note in order to pay off pressing demands and to save costs." 2. That the defend-

ants, by their own orders and acts, caused a levy of execution not to be made until 1866, about three years after judgment, and then the execution was directed to one of the defendants in the execution, and by him as set forth in the record hereto annexed, and then not kept up and
(45) perfected as a lien on the lands of defendants in the execution so as to secure the debt." Taking all this to be so, it does not warrant the legal inference of a want of due diligence without a finding of the further fact that it was for the interest of the trust fund that it should, in 1863 and 1864, have been collected in Confederate money, or else the defendants should have taken upon themselves the odium of attempting to collect the debt in specie; and the further fact that the defendants, in the exercise of due diligence, should have foreseen the fact that at the close of the war there was to be a military order forbidding the collection of all debts contracted for the purchase of slaves; and of the further fact, under the construction given to the homestead law it would be held to apply to pre-existing debts, as in *Hill v. Kesler,* 63 N. C., 437, and that such significance would be given to the fact of a *levy on land,* as in *McKeethan v. Terry,* 64 N. C., 25. 3. "That the defendants, when they made the settlement, 27 September, 1863, accounted for the Baxter debt and undertook to pay off all of the distributees in Confederate money in full and retain the said note themselves, and actually did pay off, tender, or file away Confederate money for said distributees to the full amount of the estate, the Baxter note included."

Whereupon the Court declares that the defendants have not used proper and due diligence in endeavoring to secure and collect the Baxter debt, and are chargeable with the amount of the said debt and interest.

This third fact, as it seems to us, instead of tending to show a want of due diligence tends to show the contrary, for if the defendants designed to make the Baxter note their own by settling up the estate in Confederate money and holding back this note for themselves that relieves them from the implication of a want of diligence in its collection, as it is to be supposed they would use due diligence in collecting a note which they believed had become their own; although it may subject them to the imputation of an attempt fraudulently to convert to their own use a note belonging to the State.

So his Honor missed the point, and instead of (46) the legal inference of a want of due diligence he should have considered whether the facts warranted the legal inference of fraud, and then he would have been led to the consideration of the question, Can a *cestui que trust* who seeks to follow the fund hold the trustee liable when he has made no profit and the fund has been lost notwithstanding due diligence on his part to pursue it? If so, a court of equity will impose *a penalty,* for which we find no precedent in the books, for this finding of his Honor does not warrant the legal inference of a want of due diligence, and the defendants have made no profits.

The decision is reversed and the case remanded, to the end that the facts may be more fully found, because his Honor seems—under a misapprehension of the power of this Court to look into the testimony and supply matters of fact material to his legal inference—to have merely found the prominent facts as he considered them. In the Court below, if the parties be so advised, the right of a trial by jury as to the issue of due diligence may be demanded, so as to present that question to this Court directly for adjudication.

This will be certified.

PER CURIAM. Judgment reversed.

RODMAN, J., dissenting. I dissent from so much of the opinion of the Court in this case as decides that this Court has no right to review the opinion of the Judge below upon a question of fact made by the exceptions to the report. As I consider the question important, I hope I shall be excused for an unusual prolixity.

The Constitution, Art. IV, sec. 10, is as follows:

"Section 10. The Supreme Court shall have jurisdiction to review upon appeal any decision of the Court below upon any matter of law or legal inference; *but no issue of fact* shall be tried before this Court, and the Court shall have power to issue any remedial writs neces- (47) sary to give it *a general supervision and control* of the inferior Courts."

The particular question presented in the present case is this: A reference is made to a commissioner to report an account and he accordingly makes a report in which he finds a certain fact. One of the parties excepts to the report, for that the finding in respect to that fact is not supported by or is contrary to the evidence and that the commissioner ought, upon the evidence, to have found the other way. I agree with the rest of the Court that the Judge *may* make up an issue between the parties as to the disputed fact and submit the issue to a jury. And I also agree that he is not bound to do so, but may decide it himself. Can his decision be reviewed on appeal to this Court, or is it final? In one sense of the word it is an issue of fact, for one party affirms a fact and the other denies it. But is it such an issue of fact as the Constitution prohibits from being reviewed on appeal in this Court? I think it is not. I think that in the Constitution the phrase was intended to include only such issues of fact *as are made by the pleadings.*

The reasons which I shall offer in support of my opinion may be classed under three heads:

1. Authorities prior to the Constitution, showing the established meaning of the phrase then, and reasons for believing that it was used in that well-understood and familiar sense.

2. Authorities since the Constitution defining its meaning.

3. The great public inconvenience to result from giving to it any other meaning; raising a presumption that this, and no other, was intended in the Constitution.

1. It is a settled rule that in the construction of all legal enactments, that when technical terms are used they must be understood in the sense in which they are commonly used and understood by and among persons conversant with the art or science to which they belong. This rule has been repeatedly admitted as applicable in the construction of the Constitution of the United States.

(48) I maintain that the phrase "issue of fact," as commonly used in acts of Assembly, treatises on pleadings and other law books, and among lawyers, has a well-understood meaning which confines it, when accurately and technically used, to issues made by the pleadings.

It is trite learning that in actions at common law the rules cf pleading were so framed as to compel the parties by their respective allegations and denials finally to come to some single, certain and material fact alleged on one side and denied on the other. Then the parties were said to be at issue, and the question so raised was called an issue of fact. It was called "an issue"' because it was the *"exitus"* or end of the pleadings. At common law but a single plea was allowed and there could be but a single issue. Afterwards, by statute of Anne several pleas were permitted and consquently the issues might be proportionately more numerous. But this change is not material for the present purpose. There may be issues of law also made in like manner, but as such issues have no bearing in the present discussion I omit to notice them.

I think it will not be seriously denied that, as applied to actions at law, such is the primary meaning of the phrase, and its only meaning when accurately and technically used, and also its most usual meaning. No questions of fact otherwise made than by the pleadings, and which arose incidentally in the course of an action, were called issues. The following authorities, which space will not permit me to quote at length, fully support this view: 3 Bl. Com., chap. 20; Steph. Pl., 24, 54, 124, 444; Tomlin's Law Dict., Title, "Issue"; Rev. Code, chap. 31, sec. 57, rule 13. One passage only I will quote from Blackstone: "Issue, *exitus,* being the end *of the pleadings,"* etc. 3 Com. chap. 21, p. 314. No uncertainty as to the meaning of the phrase occurs until we apply it to questions which arise in suits in equity, upon the pleadings, or otherwise. But any meaning which it may have in proceedings in equity is not a primary but a secondary one, and the phrase is applied by analogy only. In early times it was never so applied; the term was unknown in such proceedings. In suits in equity (49) the rules of pleading at common law did not apply. The plaintiff stated the facts of his case *at large,* as did the defendant his defense. Of course in such statements there was much that was vague and immaterial, and the duty necessarily fell on the Judge of either formally or informally striking out the immaterial allegations and ascertaining what material fact was alleged on one side and denied on the other. The question so ascertained was called by the civilians, who alone sat, or pleaded in those courts, *litis contestatio.* Steph. Pl., *ante.* After awhile the two systems of common law and chancery began to influence each other; the pleaders in the courts of one attended the courts of the other; and the Chancellor occasionally sent such questions as he had educed to be tried by juries in the courts of common law; then the word "issue" was imported from the common law courts into the Courts of Chancery, where it had been hitherto unknown, and applied by analogy to what had been called the *"litis contestiones."* Being applied upon an analogy only, the application was naturally less precise and more general, and it sometimes extended to every question of fact which a Chancellor might think proper to submit to a jury, no matter in what way or at what stage of the suit it arose. But still, even in Courts of Chancery, its usual meaning was, and is, an issue made out of the pleadings.

The Constitution itself furnishes conclusive evidence that the phrase was used in its primary common law sense. The clause which abolishes the difference in the forms of actions at law and in equity (Art. IV, sec. 1) was copied from the law of New York, and the code of practice and procedure which commissioners were appointed to frame was evidently contemplated should be substantially similar to the one long in use in that State. This code of New York (which in this respect has been almost literally copied in our own) enacts rules of pleading which *essentially,* and in all the respects in which the common law system is distinguished (50) from the chancery system of ascertaining the issue, are those of the common law. This may be seen by comparing the rules of the code with those given by Stephen. By these the parties are, or may be, compelled to come to one or more issues decisive of the case. And although no doubt in practice it often happens that this desirable result is not attained, it is from negligence in the pleaders and indulgence in the courts, and not from anything in the rules designed to produce such an abortive result. The phrase was used in anticipation of the conversion of all actions and suits substantially into actions at law, and must have the meaning which it had as applied in such actions.

A consideration of the evil designed to be remedied by this provision in the Constitution will also help us to the meaning of the words by which it was attempted to be done. The evil was this: This Court had been in the habit of trying issues of fact in equity suits, both upon appeal and originally. This was certainly contrary to the spirit of the Bill of Rights, and to the sentiment that no court should pass both originally and finally upon such issues, but that they should in all cases be submitted to a jury as the most appropriate triers of fact. To conclude that because it was deemed imprudent to entrust the trial of facts to three men who were required to publish the reasons of their decision for public criticism, therefore the Constitution gives this power to one man sitting in a Superior Court without appeal or responsibility and not required to give, much less to publish, any reasons whatever, seems to me very much like supposing that the Constitution meant to cure a mild disease by administering a deadly poison. The remedy really adopted was to require all *issues* to be tried by a jury, and therefore to forbid their trial in this Court, which has no jury.

I pass now to the second class of reasons:

2. In *Heilig v. Stokes,* 63 N. C., 612 (June Term, 1869), the Judge below had refused to vacate an injunction and the defendant appealed. The propriety of his refusal depended on facts which were disputed. It was contended by the plaintiff that this Court could not review the judgment below, because the doing so required the trial of an issue of fact. This Court held that it had the right, and took the distinction which I now insist on between questions of fact arising incidentally or otherwise than on the pleadings, and issues of fact joined on the pleadings. This decision has met the continued approval of the profession, and has been repeatedly acted on by this Court. It is clear either that the phrase has the limited meaning which I attribute to it, or this decision was erroneous. Either the phrase is so limited or *all* questions of fact whatever, no matter when or how made, are "issues of fact" in the constitutional sense, and this Court cannot review the findings of the Judge below in any case. And if the construction were consistently carried out it would forbid this Court from finding *any* fact, either originally or on appeal. For the law is that we shall try

no issues of fact, without any exception. The Court could not punish contemptuous conduct, even in its presence, because it would require the finding of a fact. Yet it had no scruples and thought of no such construction in *Ex parte Moore,* 63 N. C., 397, where it found as a fact that certain persons had signed and published a certain writing. It would also forbid the Court from hearing any affidavit on a motion of a *certiorari*, or to amend its own records, or to refer any question to its Clerk, which, nevertheless, it constantly and properly does. If we abandon the line of distinction which I draw, and hold all questions of fact to be issues of fact in the sense of the Constitution, the Court can try none of them, for when the Constitution prescribes a law it cannot be observed or not, as may be convenient, and where that classes all questions as issues of fact the Court can make no discrimination.

Again, I do not know how the Court will decide upon the question whether a party has a right to a trial by jury of a question of fact arising upon an exception to a report. I am of opinion that he has not, because of the great inconvenience of such a course. But if I thought the exception raised an "issue of fact" in the sense of the Constitution I should think otherwise. (52) For a trial by jury of issues of fact joined on the pleadings has always been held guaranteed by section 19 of the Bill of Rights, and is given (unless where it is waived by the party) by the strongest implication by section 18, Art. IV of the Constitution, and by section 266 of C. C. P. If questions of fact made by exceptions are not issues so as to entitle a party to trial by jury, they cannot be issues to exclude a review of a Judge's finding by this Court. Again, in numerous cases this Court has referred it to its Clerk to find facts, which findings if approved must be taken to be the findings of the Court, as the Clerk has no judicial power.

In *Greenlee v. Sudderth,* 65 N. C., 470, it was referred to the Clerk to find the premium on gold. In *Boyden v. Bank,* 65 N. C., 13, not reported on that point, it was referred to find whether certain checks had been drawn. In nearly every case brought against the State the Clerk has been directed to find and report the facts. In *Whitford v. Foy,* 65 N. C., 265, it was referred to state a guardian account.

And there are many other instances of a similar practice, which I think proper, but which are inconsistent with the doctrine that all these are issues of fact, and which, if that be the doctrine, cannot be justified.

3. The Constitution, Art. IV, sec. 28, says: "The Superior Court shall be *at all times* open for the transaction of all business within their jurisdiction, except the trial of issues of fact requiring a jury." In *McAdoo v. Benbow,* 63 N. C., 461, this Court held that an act of Assembly which closed the doors of these Courts to a large part of the business within their jurisdiction for all but four weeks in the year was not repugnant to this clause. I do not mean to question that decision. I consider it *res adjudicata.* But some observations are necessary in order that I may extract from it the principle on which it was decided. Every decision should stand on some recognized principle of law more or less general. To admit that any one does not, is to admit that it stands on no principle and is arbitrary and wrong. It must be conceded that the decision cited did some (53) *apparent* violence to the language of the Constitution. It may be only a gentle violence. *"Molliter manus imposuit."* Now, on what principle was the violence justified and the case decided? I humbly conceive on this that if a literal or strict construction of a clause in any statute will work a great public inconvenience, even if the language be plain, a Court is justified on that ground, *"in salutem rei-republicæ,"* to give it a construction which will avoid the inconvenience. It was argued, indeed, in that case that an observance of the clause was physically impossible because the Judge could not be in court all night and on Sundays. But this difficulty was purely imaginary, since evidently the legal construction was that the court should be open at all *reasonable* times. Again, it was said that *the court* could not always be open because the *Judge* was required to hold courts in several counties, and could not be in any one all the time. But this is an evident fallacy, for the *Judge* is not required to be in court all the time, he being but one member of the Court, and all the business to be done in his absence being that which the Clerk had original jurisdiction to do. So there was in fact no physical impossibility, and the reason must have been what I have assigned. This principle goes to the verge of

judicial power and touches the borders of the "higher law"; but I think within proper limits it may be maintained, and it is affirmed by the case cited. I do not think it necessary to call in the aid of this principle to sustain my present views. But when we consider the great public inconvenience, to say the least, which will follow from the construction now proposed, I think if there was ever a case in which the principle of *McAdoo v. Benbow* ought to weigh, it is this.

This construction gives to a Superior Court Judge not only the original but the final and irresponsible finding of a large class of facts that may be of a most complicated character and involving great values. His finding is subject to no review; it is made upon a hearing which can scarcely be called public, in the hurry and confusion of term time. He (54) gives no reasons; the finding itself may be unknown except to the parties. Except in a case of gross and provable corruption the irresponsibility could not be more complete. No Judge out of North Carolina—at least none in the United States or in England—has ever possessed such a power. It is at least liable to abuse, and is certain to be attended with occasional errors, which, nevertheless, however patent, cannot be corrected. I think this Court needlessly strips itself of a very important power which the Constitution intended to give to it. I may be asked, if the Judges of the Superior Courts should not have this power, are we any more fit to have it than they? Certainly it would be indecent, and without a reason, to claim for the Judges of this Court any greater uprightness or wisdom than I concede to those of the Superior Courts. But the power which I think belongs to this Court is not that which I deny to the Superior Court Judges, but a different one. It is not to find originally and finally, but only finally on review, a power which must be lodged somewhere. And I do think that with the advantages which this Court has in its numbers as insuring full discussion and patient deliberation, and with the original finding of the Judge, with or without his reasons, it will often be able to detect errors which escaped him, and which upon a second examination are obvious enough.

When I claim for this Court the power to review on appeal the findings of the Judge, I do not understand it will be usually, if ever, necessary to balance the credibility of witnesses, or to inquire anew into the primary facts and subordinate facts from which the general or ultimate conclusion of fact is inferred. Almost always the general facts which the Judge finds, and to which the principles of law are to be applied, are inferences from other facts or circumstances in evidence. The Judge may mistake the bearing or weight of these upon the general conclusion. Although the process by which he arrives at his conclusion is a reasoning from one or several facts to a more general one, and is not a finding of the law or a legal inference from facts, yet it partakes of the nature of it, and is equally susceptible of and proper for review.

I believe the practice of all courts out of this State conforms to this view.

BYNUM, J., did not sit, having been of counsel.

Cited: Wells v. Sluder, post, 59; *Isler v. Murphy,* 71 N. C., 438; *Atkinson v. Whitehead,* 77 N. C., 419; *Pasour v. Lineberger,* 90 N. C., 162; *Gay v. Grant,* 101 N. C., 209; *Nissen v. Mining Co.,* 104 N. C., 310.

STATE on the relation of W. P. M. WELLS v. F. SLUDER and M. M. WEAVER, administrators, and others.

1. A defendant in the exercise of due diligence in collecting a bond due a ward is not required to foresee the fact that under the construction given to the homestead law it would be held to apply to pre-existing debts; nor the fact that a levy before the adoption of the Constitution would hold good, notwithstanding the provisions of such law.
2. A party who at first refuses to receive Confederate money in payment of a debt due a ward is afterwards prevailed upon so to do by the declarations of the obligor yields to a groundless fear, and is liable to the ward for the amount so received.

(*Harshaw v. Dobson,* 67 N. C., 203, cited and distinguished from this; *Keener v. Finger, supra; Shipp v. Hettrick,* 63 N. C., 329, cited and approved; *Hill v. Kesler, Ibid.,* 437, and *McKeithan v. Terry,* 64 N. C., 25, cited and approved).

CIVIL ACTION to recover amount due plaintiff on a guardian bond, heard before *Henry, Judge,* at Fall Term, 1863, of the Superior Court of BUNCOMBE, on the following statement of facts:

The intestate of the defendants, Sluder and Weaver, was the guardian of the plaintiff, and loaned some of the funds of his ward to one L. F. Sensabaugh, taking a note and security.

This note is dated .... day of ......, before the war, and the makers were resident in the county of Haywood. The defendants found the note amongst the papers of their intestate in January, 1863, and obtained a judgment (56) thereon in the Superior Court of Buncombe County in November, 1867, and issued an execution in February, 1868. This judgment was regularly docketed in Buncombe Superior Court, and execution issued to Haywood (judgment not having been docketed in Haywood); execution continuing till June, 1873, uncollected, with the exception of $100 paid to F. Sluder, one of the administrators, on 28 April, 1869. The several returns to the execution were, at different times, "Search made and no goods found subject to execution"; "Came to hand too late to advertise and sell real estate"; "Plaintiff's receipt on file for $100"; "Remainder suspended by order of plaintiff for the present," which Sluder alleges was done, it being promised to be paid. It is admitted that the maker of the note was solvent for the amount at the date of its execution, and continued to be until the adoption of the present Constitution, when the homestead provision and personal property exemption rendered it impossible to collect it.

If the Court is of the opinion that the defendants and their intestate, the said guardian of the plaintiff, have not been guilty of neglect in not collecting the Sensabaugh judgment, and that they are entitled to a credit for the amount of the same, then it is agreed that the judgment shall be credited with $372, balance of amount due on said Sensabaugh judgment.

The defendants further claim another credit upon the following grounds, to-wit:

On 11 May, 1863, the defendant, F. Sluder, met with R. W. Patty, who owed the intestate a guardian note of $...., dated before the war, for the loan of money belonging to the estate of the plaintiff, and who offered to pay the same in Confederate money. The defendant declined to receive it. Patty insisted that Confederate currency was a legal tender, and, raising his hand, said, "I intend to have my note; Confederate money is a legal tender," and Sluder, believing he was required by law to accept it, having heard that Judge Saunders had recently charged a jury that it was an indictable offense to refuse Confederate (57) money, received it of Patty. He mixed this money with other funds belonging to the estate of his intestate and used it, receiving full credit for the same in his settlement with the Probate Judge. Plaintiff has never received it.

If upon this state of facts the Court should be of opinion that the defendant ought not to be held responsible to plaintiff for the amount of this Patty debt, it is agreed that the judgment herein agreed to shall be further credited with $155, or its value in good money.

It was agreed that if neither of the foregoing credits claimed by defendants should be allowed by the Court, that judgment should be entered for the plaintiff for the penalty of the bond, to be discharged upon the payment of $1,185.54; and that if either one, or both, should be allowed, said judgment was to be credited as hereinbefore claimed.

His Honor, being of opinion with the plaintiff, refused to allow the set-off of the defendants and gave his judgment for the full amount, to-wit, $1,155.64 and costs; from which judgment defendants appealed to this Court.

A. T. & T. F. Davidson, for appellants.
T. D. Johnson, contra.

PEARSON, C. J. In regard to the Sensabaugh debt (59) we do not concur in the legal inference of his Honor that the facts set out in the "case agreed" establish a want of due diligence on the part of the administrator.

As is said in *Keener v. Finger, ante,* 35, "The defendants, in the exercise of due diligence, were not required to foresee the fact that under the construction given to the homestead act it would be held to apply to pre-existing debts, as in *Hill v. Kesler,* 63 N. C., 437, and that such significance would be given to the fact of a *levy on land* as in *McKeithan v. Terry.* 64 N. C., 25. We are of opinion that the defendants are entitled to the credit claimed in respect to this debt, according to the case agreed.

In regard to the Patty note, we concur with his Honor.

The defendant Sluder at first declined to receive Confederate notes. This shows he was aware it was not prudent (60) to do so, and it was his misfortune to allow himself to be intimidated by what he had heard of the intemperate language of Judge Saunders and to yield to a groundless fear. This distinguishes the case from *Harshaw v. Dobson,* 67 N. C., 203, where the "duress" was direct, immediate and on the spot. Here it was indirect, remote and not in the face of a Judge unduly excited by his zeal for the Confederate cause, and with the power apparently to carry his threats into execution and order an infirm old man to be *"sent to Richmond."*

The defendant having received the money, the question is, shall the loss fall upon the trust fund or upon him? The fact that he made use of the money and mixed it with his own settles the question. *Shipp v. Hettrick,* 63 N. C., 329.

The judgment below will be modified according to this opinion, and the costs of this Court will be taxed against the parties equally.

PER CURIAM. Judgment accordingly.

Cited: Wells v. Sluder, 72 N. C., 436.

STATE v. RICHARD OLIVER.

The doctrine of years ago that a husband had the right to whip his wife, provided he used a switch no larger than his thumb, no longer governs the decisions of our Courts; and the opinion, more in accordance with our present civilization, that a husband has no legal right to chastise his wife under any circumstances, prevails.

INDICTMENT for an assault and battery, tried before *Mitchell, Judge,* at Fall Term, 1873, ALEXANDER Superior Court.

On the trial the jury found the following facts:

Defendant came home intoxicated one morning after breakfast was over; got some raw bacon, said it had skippers on it, and told his wife she would not clean it. He (61) sat down and ate a little, when he threw the coffee cup and pot into the corner of the room and went out; while out he cut two switches, brought them in, and, throwing them on the floor, told his wife that if he whipped her she would leave; that he was going to whip her, for she and her d—d mother had aggravated him near to death. He then struck her five licks with the two switches, which were about four feet long, with the branches on them about half way and some leaves. One of the switches was about half as large as a man's little finger; the other not so large. He had them in both hands, and inflicted bruises on her arm which remained for two weeks, but did not disable her from work.

One of the witnesses swore he struck as hard as he could. Others were present, and after defendant had struck four licks told him to desist. Defendant stopped, saying if they had not been there he would have worn her out.

Upon these facts the Court found defendant guilty and fined him $10. Defendant appealed.

Armfield, for defendant.

Attorney General Hargrove, for the State, called the attention of the Court to the cases of *State v. Black,* 60 N. C., 262; *State v. Mabry,* 64 N. C., 592; *State v. Rhodes,* 61 N. C., 453; *State v. Hussey,* 44 N. C., 123, and *State v. Pendergrass,* 19 N. C., 365.

SETTLE, J. We may assume that the old doctrine that a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina. Indeed, the Courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances.

But from motives of public policy, and in order to preserve the sanctity of the domestic circle, the Courts will not listen to trivial complaints.

If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.

No general rule can be applied, but each case must depend upon the circumstances surrounding it.

Without adverting in detail to the facts established by the special verdict in this case, we think that they show both malice and cruelty.

In fact it is difficult to conceive how a man who has promised upon the altar to love, comfort, honor and keep a woman can lay rude and violent hands upon her without having malice and cruelty in his heart.

Let it be certified that the judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: State v. Davidson, 77 N. C., 523; *State v. Dowell,* 106 N. C., 724; *State v. Jones,* 132 N. C., 1049; *Harvey v. Johnson,* 133 N. C., 365.

STATE v. CAUBLE.

1. The Superior Courts have the power to amend a warrant issued by a Justice of the Peace against a person refusing to work the road by inserting the State as plaintiff instead of the overseer.
2. An order issued by the Township Board of Trustees appointing a person overseer of a road is proper evidence of such appointment and is admissible.
3. Section hands employed on our railroads at regular wages are not thereby excused from working on the public highways of the country.

CRIMINAL ACTION for refusing to work on public road (Bat. Rev., chap. 104, sec. 10), tried before *Albertson, Judge,* at Special (August) Term, 1873, Superior Court of ROWAN.

The action was commenced by warrant in the name of John Barger against the defendant, charging him with refusing or neglecting to work on the public road, of which (63) Barger had been appointed overseer. It was tried first by a Justice of the Peace and judgment given against defendant, from which he appealed to the Superior Court. Before submitting the case to the jury, on motion of the Solicitor the warrant was amended by inserting the

State as plaintiff in lieu of John Barger, the prosecutor. To this amendment defendant objected.

The jury found the defendant guilty, subject to the opinion of the Court upon the following facts:

The defendant is, and has continually been, since August, 1868, a section hand upon the Western North Carolina Railroad, and was thus engaged when summoned to work the public road by the prosecutor; that his duties as section hand required all his time and attention, frequently having to work all night; that among other duties the section hands keep the road-bed in repair and perform other work requiring experience and skill, and if they be taken away it greatly increases the liability to accidents, thereby endangering the lives of passengers. If upon the above state of facts the Court is of opinion that the defendant is excused from working on the public road, then the jury find the defendant not guilty; if the Court is of opinion that the defendant is not excused because of such facts, then the defendant is guilty as charged.

The Court being of opinion that the facts stated did not excuse the defendant, he was found guilty.

Defendant moved for a new trial on the ground:

1. His Honor received as evidence the order of the Township Board of Trustees appointing the prosecutor and delegating certain hands to work with him.

2. His Honor permitted evidence to be introduced tending to prove that defendant lived within the district assigned to the overseer to get his hands from.

3. The Court rejected the testimony of the defendant in his own behalf because this is a criminal action.

4. The Court permitted the warrant and other process to be amended by inserting the State in place of the name of John Barger, the prosecutor.

Motion for a new trial overruled. Judgment and appeal by defendant to this Court.

1. Order insufficient. *Woolard v. McCollock,* 23 N. C., 432; *Tarkington v. McRae,* 47 N. C., 47.

2. The section hands on railroads are not within the spirit and reason of the law compelling people to work the ordinary highways. The railroads are highways, and every consideration of public policy requires that the section hands should not be taken away. *Davis v. Railroad,* 19 N. C., 451.

McCorkle & Bailey, for defendant.

Attorney-General Hargrove and *Jones & Jones,* for the State.

BYNUM, J. This was a criminal action against the defendant for failure to work on the public road, founded on section 10, chapter 104, Bat. Rev. On the trial in the Superior Court several objections were raised by defendant:

1. That the Court had no power to amend the warrant by striking out the name of John Barger as plaintiff and inserting the name of the State as prosecutor. The power of the Court to make any amendment in furtherance of justice is ample. C. C. P., sec. 132. The change did not affect the defense or take the defendant at a disadvantage, and he therefore has no cause of complaint.

2. That the order of the Board of Township Trustees appointing the overseer and designating his district and hands was inadmissible evidence.

The ground of this objection was not stated and cannot be seen. The authority of the overseer was a necessary part of the plaintiff's case, and there could be no higher evidence of this than the order itself. The legal effect of the order, after it was put in evidence, is another question. To bring (65) the defendant within the operation of this order the State introduced a witness to prove that the defendant resided within the road district embraced in the order and was therefore liable to road duty. This would seem to be enough to put him upon his defense, and he thereupon:

3. Offered himself as a witness in his own behalf. This was objected to by the State, and he was ruled out by the Court properly, first, because the defendant did not set forth what he proposed to prove by his own evidence, so that the Court could see that it was competent, and second, because this is a criminal action, and he is, by law, not competent to give evidence in his own behalf. Bat. Rev., chap. 43, sec. 10.

4. The last objection was grounded on the special verdict finding that the defendant, at the time he was notified to work the road, was a section hand and in the constant employ of the Western North Carolina Railroad Company, and his duties required him to be always there.

Admit that a railroad is a public highway, yet the defendant cannot discharge himself from a public duty by hiring himself to work another highway for wages. There was no authority in the railroad company, and no law, to compel his services there, and he cannot escape an important and necessary public duty by such an evasion. There was but one mode of discharging himself from working this road, and that was by applying to and obtaining from the Township Trustees an exemption from road duty on sufficient cause shown. Bat. Rev., chap. 104, sec. 13. This the defendant failed to do, and he must take the legal consequences of his own contumacy. The recent law making a failure to work the public roads a criminal offense is a wise one, and if rigidly enforced will be of great public benefit in a direction where it is much needed.

PER CURIAM. Judgment affirmed.

Cited: Cheatham v. Crews, 81 N. C., 346; *State v. Craig, Ib.,* 589; *Bank v. McArthur,* 82 N. C., 110; *Reynolds v. Smathers,* 87 N. C., 27; *State v. Johnston,* 118 N. C., 1189.

(66)

STATE v. JOHN YORK, BARNEY SIGMON and others.

It is not necessary to constitute a riot that the facts charged should amount to a distinct and substantive indictable offense; it is sufficient if such facts shall constitute an attempt to commit an act of violence which, if completed, would be an indictable offense.

(Cases of *State v. Fitzgerald,* 18 N. C., 408; *State v. Haithcock,* 29 N. C., 52, cited and approved).

INDICTMENT for a riot, tried before *Henry, Judge,* at Spring Term, 1873, of Superior Court of BURKE.

The indictment charged John York, Barney Sigmon and others, naming them, "unlawfully, violently, riotously and tumultuously assembled and gathered together to disturb the peace," etc., "and being so then and there assembled together, did then and there make great noises, riot, tumult and disturbance, and then and there unlawfully, violently, riotously and tumultuously remained and continued together, making such noise," etc., "for the space of a half hour or more, and being so assembled together for the purpose aforesaid, with sticks and stones, did follow and pursue one David Tallent for the purpose of assaulting and beating him, the said David Tallent," etc., to his great terror, etc.

Upon this indictment the defendants were found guilty, when their counsel moved an arrest of judgment, for the reason that the indictment is defective and insufficient. Motion overruled, whereupon the defendants appealed.

No counsel in this Court for defendants.
Attorney-General Hargrove, for the State.

BYNUM, J. The defendants, with others, are indicted for a riot. If the indictment had stopped short of the charge that being so riotously assembled the defendants "with sticks and stones did follow and pursue one David Tallent for the purpose of assaulting and beating him, to the terror (67) of said Tallent and the good citizens of the State, then and there being and residing," it would have been insufficient. Every indictment is a compound of law and fact, and it is essential that "the special manner of the whole fact must be set forth with such certainty that it may judicially appear to the Court that the indictors have not gone on insufficient premises." *State v. Fitzgerald*, 18 N. C., 408; *State v. Haithcock*, 29 N. C., 52.

But when the indictment charges the armed pursuit of Tallent by a multitude, with the purpose and intent to assault and beat him, to his terror, it does charge facts which the Court can see upon inspection constitute the crime alleged. For it is not necessary to constitute a riot that the facts charged should amount to a distinct and substantive indictable offense. It is sufficient to complete this offense that the facts charged shall constitute an attempt to commit an act of violence which, if completed, would be an indictable offense. So it is immaterial in our case whether the facts set forth constitute an assault or an attempt to assault David Tallent, for the multitude, the unlawful purpose, the arms and the attempt to assault constitute the crime as a conclusion of law.

There is no error.

PER CURIAM. Judgment affirmed.

STATE v. STEPHEN POWELL.

An indictment, in which it is charged that the defendant "did profanely curse and swear and take the name of Almighty God in vain," etc., "to the common nuisance," etc., charges no offense, and cannot be sustained.

(*State v. Pepper*, 68 N. C., 259, cited and approved).

INDICTMENT for profane swearing, tried before *Clarke, Judge*, at Fall Term, 1873, ROBESON Superior Court.

The defendant was charged in the indictment that (68) he did at divers times in the streets of the town of Lumberton "profanely curse and swear and take the name of Almighty God in vain," concluding "to the common nuisance," etc.

It was proved that the defendant was in the habit of using profane language so loud that he could be heard to a distance of two or three hundred yards; that he would curse on the streets from dark until 10 o'clock at night, and that persons in the streets and houses heard him; that he would curse and swear for two or three hours at a time.

His Honor charged the jury that if the defendant continuously and habitually profanely cursed and swore, to the nuisance and inconvenience of the neighbors, and to the disturbance of the good order and peace of the community, they would find him guilty.

Verdict, guilty. Motion for a new trial; motion refused; defendant appealed.

Battle & Son, for defendant, submitted

That the indictment was insufficient—

Because it does not charge the defendant to be a common and notorious profane swearer.

Because it does not charge that there were any persons then and there assembled to hear the profane swearing.

Because it does not state that the profane swearing was in hearing of any person. The case of *State v. Jones*, 31 N. C., 38, and *State v. Pepper*, 68 N. C., 259, will sustain the foregoing objections.

Attorney-General Hargrove, for the State.

READE, J. The charge in the indictment is that the defendant did "publicly in the streets of the town of Lumberton profanely curse and swear and take the name of Almighty God in vain."

The question is whether any crime is charged, whether profane swearing in public is, of *itself*, a nuisance.

(69) Profane swearing is irreligious beyond doubt; and it may be admitted to be immoral; and, to the refined, coarse and vulgar. And very clearly it may be *so* used as to be a nuisance—as, for instance, if it be loud and continued. But nothing of the sort is charged in the indictment. It was indeed *proved* that the defendant used profane language "so loudly that he could be heard at the distance of two or three hundred yards and from dark until 10 o'clock at night, and that persons in the street and houses heard him." And his Honor charged the jury that this was a nuisance. Take that to be so, but the misfortune is that nothing of the sort is charged in the indictment. And the *probata* cannot supply the want of the *allegata*. It is charged only that he cursed and swore publicly in the street; but whether in a whisper or aloud, once or repeatedly, for a moment or an hour, or whether heard by any or many, is not charged.

It is true that in the conclusion of the indictment it is alleged that what the defendant did was "to the common nuisance of the good people of the State then and there being and residing"; but it is settled that a conclusion of that sort does not supply any defect in the main body of the allegation. 2 Bish. Crim. Prac., secs. 812, 813.

Suppose the indictment had charged that the defendant publicly smoked a cigar in the street, etc., to the common nuisance, etc.

We would have to hold that smoking a cigar in the street is not a crime, and therefore that the defendant could not be convicted of a nuisance; or if charged with so misbehaving himself as to be a nuisance, without saying how he had misbehaved, or what he had done, so as to enable the Court to see that the misbehavior charged, if proved, amounted to a nuisance, we should have to hold that no crime was charged.

In *State v. Pepper*, lately before this Court, 68 N. C., 259, the questions involved in this case are so well considered that it is only necessary to refer to it as decisive of this case.

This will be certified that the judgment may be arrested.

PER CURIAM. Judgment arrested.

Cited: State v. Barham, 79 N. C., 648; *State v. Chrisp,* 85 N. C., 531.

STATE *v.* LEWIS PAINTER and others.

In an indictment under chapter 32, section 95 of Bat. Rev., the charge that the defendants "unlawfully and willfully did kill, injure and abuse one cow, one heifer, the property," etc., "which said cow and heifer were then and there in an enclosure not then and there surrounded by a lawful and sufficient fence," is sufficient.

(*State v. Allen,* 69 N. C., 23, cited and approved).

INDICTMENT for killing or abusing stock (Bat. Rev., chap. 32, sec. 95), tried at Fall Term, 1873, Superior Court of WILKES, before *Mitchell, Judge.*

The charge against defendants as set out in the bill of indictment was that they "unlawfully and willfully did kill, injure and abuse one cow, one heifer, the property of one B. P. Johnson, which said cow and heifer were then and there in an enclosure, not then and there surrounded by a lawful and sufficient fence, against the statute," etc.

Upon the evidence submitted by the State the jury found the defendants guilty. It was then moved by their counsel to arrest the judgment, for that the indictment is defective for want of certainty in describing the enclosure. Motion refused and judgment against the defendants, from which they appealed to this Court.

Todd, for defendants.

Attorney-General Hargrove, for the State.

SETTLE, J. "If any person shall kill any horse, mule, cattle, hog, sheep or neat cattle, the property of another, in any enclosure not surrounded by a lawful fence, such person shall be deemed guilty of a misdemeanor," etc. Battle's Revisal, chap. 32, sec. 95.

The defendants object to an indictment founded on the foregoing statute, for want of certainty in the description of the enclosure in which the offense is charged to have (71) been committed. The indictment follows the words of the statute, but does not aver to whom the enclosure belongs. It would have been better and more satisfactory had it done so; but this Court, after hesitation, held such an indictment to be good. *State v. Allen,* 69 N. C., 23.

As the case cited was decided at our last term, it is evident that it had not been seen by the defendant's counsel when the appeal was taken.

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

Cited: State v. Parker, 81 N. C., 549; *State v. Whitaker,* 85 N. C., 569.

STATE v. ALEXANDER COVINGTON.

To constitute the offense of forcible trespass there must be a "demonstration of force" such as is calculated to intimidate or put in fear, the law not allowing its aid to be invoked by indictment for rudeness of language or even slight demonstration of force against which ordinary firmness will be sufficient protection.

(Cases of *State v. Ray,* 32 N. C., 39; *State v. Ross,* 49 N. C., 315; *State v. McCanless,* 31 N. C., 375, cited and approved).

INDICTMENT for forcible trespass, tried before *Buxton, Judge,* at Fall Term, 1873, Superior Court of RICHMOND.

The indictment charged the defendant with a forcible trespass on premises in possession of James W. and Thomas K. Farmer, the latter of whom was the only witness.

He testified that he and his brother James W. had some land rented in 1872, and hired the defendant to work for the year; they were to give him $210 in money and two acres of old land and as much more as he could clear around his house (to cultivate for himself). Defendant worked until (72) 26 July, when he said he was going to quit; that the prosecutors (the Farmers) might take it and go with it, and that he would have no more to do with it, giving as a reason that he was not getting enough. The Farmers thereupon took the land into their own possession, and at fodder-pulling time, when they were both in the field, the defendant came and said: "Boys, the fodder is ripe; I am going to pull it and have it, or die." He did pull it, and left.

On his cross-examination the witness said that the contract was made with defendant before Christmas, and he was to have commenced work on 1 January, but did not come until the latter part of the month. The contract was that he was to work all the year, and not merely until laying-by crop time; he was to work in the crop with the prosecutors; the land was their uncle's; they rented it. The defendant started the conversation alluded to himself, saying his time was up. They replied no, the year was not out. He again said his time was out and he was going to quit. He did quit, leaving his hoe standing up in the field. The crop had not been laid by. Nobody was with him when he came to pull the fodder; they said nothing until he spoke and said: "That is my fodder; I am going to pull it and have it, or die." He was told that it was not his, and that they would try and get protection. He said he did not care for sheriffs, law or anything else. He hauled the fodder away the same day. When the prosecutors instituted legal proceedings the defendant brought the fodder back.

The defendant's counsel asked his Honor to charge the jury:

1. That in order to make defendant guilty he must have entered in such way and with such an exhibition of force as was calculated to excite terror and to intimidate.

2. If defendant thought he had a *bona fide* claim he was not guilty, even if he took off the property.

3. That there was no evidence of defendant's having been forbidden, and therefore he was not guilty.

4. That if even the defendant had abandoned the crop, there was no evidence of sufficient force to make (73) him guilty of a forcible trespass.

His Honor declined to charge as requested, and instructed the jury that if the defendant abandoned the crop on the premises alluded to, there was evidence of sufficient force to warrant a conviction for forcible trespass at common law; but if defendant had not so abandoned the crop, then the possession was his and he was not guilty. To this charge the defendant excepted.

The jury returned a verdict of guilty. Rule for a new trial granted and discharged. Judgment, and appeal by defendant.

Steele and *Walker,* for defendant, cited and commented on chapter 17, section 237, Bat. Rev.; *State v. Ross,* 49 N. C., 315; *State v. McCanless,* 31 N. C., 375; *The Six Carpenters' case,* 1 Smith's L. C., 259; Parsons Contracts (5 Ed.), 575 to 680.

Attorney-General Hargrove, for the State.

BYNUM, J. The counsel for the defendant asked the Court below to instruct the jury that in order to make the defendant guilty under the indictment he must have entered in such way and with such an exhibition of force as was calculated to excite terror and to intimidate; and further, that even if the defendant had abandoned the crop on the two acres, there was no evidence of sufficient force to render him guilty of forcible trespass.

His Honor refused to give these instructions, but charged the jury "that if the defendant abandoned the crop on the two acres there was evidence of sufficient force to warrant a conviction for forcible trespass at common law"; but that "if he had not abandoned the crop he could not be convicted."

We think there was error. This Court has repeatedly held that to constitute the offense of forcible trespass there must be a demonstration of force, as with weapons or multi-
(74) tude of people, so as to make a breach of the peace, or directly tend to it, or be calculated to intimidate or put in fear. *State v. Ray,* 32 N. C., 39; *State v. Ross,* 49 N. C., 315; *State v. McCanless,* 31 N. C., 377.

It is essential to the offense that there should be a "demonstration of force," which is, perhaps, the best definition of the term *"manu forti"* and its English equivalent, "with strong hand." This demonstration of force is to be distinguished from *bare words,* which, however violent, cannot of themselves constitute the force necessary to complete the offense. Words accompanied by a display of weapons, or other signs of force, may constitute the offense, or words accompanied by numbers may be sufficient, but in either case there must be some outward act as distinguished from bare words, which are often only the exhibition of harmless passion, and do not by themselves constitute a breach of the peace. To complete the offense there must not only be a demonstration of force, but it must be also such as is calculated to intimidate or put in fear. Here the alleged trespass was committed by one person on the actual possession of two who were both on the spot. Nothing else appearing, the law intends that all men possess ordinary courage and firmness, and that they shall exercise them in the legal protection of their persons and property. The law does not allow its aid to be invoked by indictment for rudeness of language, or even slight demonstrations of force, against which ordinary firmness will be a sufficient protection. It is against our material interests and our reason for one man, by bare words, to drive twenty from the possession of their property; so here the bare words of one man unaccompanied by any exhibition of force are not sufficient or calculated to excite terror or to intimidate two men of ordinary courage and firmness, as the law assumes them to be.

As this disposes of the case without reference to the question of abandonment, it is unnecessary to pursue the matter further.

Judgment reversed and *venire de novo*.

PER CURIAM. *Venire de novo.*

Cited: State v. King, 74 N. C., 178; *State v. Lloyd,* 85 N. C., 575; *State v. Mills,* 104 N. C., 907; *State v. Davis,* 109 N. C., 812.

(75)

STATE v. JAMES JONES.

The defendant sold to the prosecutor four barrels of crude turpentine, representing "that they were all right, just as good at bottom as they were at top," etc., and when examined the barrels contained only a small quantity of turpentine on the top of each, the rest of the contents being chips and dirt: *Held,* that the defendant was guilty of cheating by false tokens.

(Case of *State v. Phifer,* 65 N. C., 321, cited and approved).

INDICTMENT for cheating by false tokens, etc. (Bat. Rev., chap. 32, secs. 66, 67), tried before *Clarke, Judge,* at Fall Term, 1873, ROBESON Superior Court.

The allegation in the indictment was that the defendant, intending to cheat, etc., one Collins, unlawfully, knowingly, etc., sold him four barrels of lightwood chips, billets of wood, and dirt, covered on top with turpentine, for four barrels of merchantable turpentine (*scrape,* as it is known in the trade), for which he obtained ten dollars.

It was in evidence for the State that the defendant endeavored to sell the barrels purporting to contain scrape to one Britt before going to the store of Collins, but Britt, discovering something suspicious in the appearance of the barrels, asked to examine them, which was objected to by defendant, who said that he would not cut the staves. Upon opening the heads, Britt found a top skin of turpentine about an inch thick and chips hewed from the boxes beautifully arranged under that. Britt told the defendant it was not turpentine and that it was worthless. Defendant said it was good—that he sold plenty like it, and asked Britt to say nothing about it.

It further appeared that defendant carried it to the store of Collins, at the time in the keeping of his son, twelve years old, and proposed to sell him the four barrels of turpentine, remarking that it was all right; that he (the son) "need not examine it, but might take his word for it that it was as good at the bottom of the barrels as it was on top"; that (76) when the barrels were emptied they were found to contain a small quantity of turpentine, the rest lightwood chips and dirt.

Collins, the prosecutor, testified that he spoke to defendant about it after the sale, and he said he was ashamed of selling the turpentine to a boy; that he had received a ten-dollar bill for it and would make it all right. Flack, another witness, heard the defendant tell the son, after receiving payment for the four barrels, that if upon examination it was not all right he would refund the money.

Defendant's counsel asked his Honor to charge:

That unless the agent of Collins informed him of the alleged false pretense, before he (the agent) delivered the goods to the defendant, the jury cannot convict.

That if the jury think that the prosecutor had the means of detection at hand and did not use it the jury cannot convict.

That if the jury think that there was a warranty, and that the prosecutor relied upon that warranty, they cannot convict.

That the jury must believe that the prosecutor relied upon the false pretenses, believing them to be true, or they cannot convict.

That it is for the jury to say whether or not the prosecutor had the means at hand to detect the fraud.

All of which instructions his Honor declined to give, and charged the jury that if the defendant knowingly and intentionally offered for sale and did sell, as charged in the indictment, the turpentine, as merchantable hard or scrape turpentine, knowing the same to be fraudulently mixed with chips, etc., he is guilty; that deceiving an agent in the execution of his appropriate business, which he is employed to transact, is the same as deceiving the principal; and that if the jury are satisfied from the evidence that the defendant was the active agent in the transaction, and that he is guilty of unmistakable and intentional fraud and deception, then they are to return a verdict of guilty.

The jury found defendant guilty. Rule for a new trial; rule discharged. Judgment, and appeal by defendant. (77)

Battle & Son, for defendant, argued:

That the Court ought to have charged that if the falsity of the representations as to the quality of the turpentine could have been ascertained by ordinary prudence, the defendant was not guilty. *State v. Phifer,* 65 N. C., 326; Wharton Am. Crim. L., secs. 2122, 2129, 2131 and 2133; Roscoe Crim. Ev., 443.

Hargrove, Attorney-General, contra.

SETTLE, J. The doctrine of *caveat emptor* upon which the defendant relies does not apply to the facts in the case before us.

After the very thorough discussion of the crime of cheating by false tokens, pretenses, etc., and the citation of authorities, by *Reade, Judge,* in *State v. Phifer,* 65 N. C., 321, it would be useless to pursue the subject further.

The facts in this case fall clearly under the denunciation of our statute. Rev. Code, chap. 34, sec. 67. And notwithstanding the objection urged by counsel to the charge of his Honor, we are of opinion that he submitted the case to the jury in as favorable light to the defendant as he had a right to expect. There is no error.

PER CURIAM. Judgment affirmed.

Cited: State v. Young, 76 N. C., 260; *State v. Lambeth,* 80 N. C., 395; *State v. Holmes,* 82 N. C., 608; *State v. Eason,* 86 N. C., 675; *State v. Dickson,* 88 N. C., 645; *State v. Daniel,* 114 N. C., 824.

STATE v. HANDY FISHER.

Larceny may be committed in a crowd or in the public streets; and where the defendant obtained possession of a hog from a stranger, claiming it as his own, and carried the hog home, altered the mark and put it in the pen with his other hogs: *Held,* it to be no error in the Judge below to leave it to the jury to say whether the taking was done for the purpose of depriving the real owner of his property and converting the same to his own use or not; and if so done, the defendant was guilty.

INDICTMENT for larceny, tried at Spring Term, 1873, of BLADEN Superior Court, before *Russell, Judge.*

The defendant was charged with stealing a hog, the property of one Averett. The evidence on the part of the State was that Averett lost his hog and found it in the pen of defendant, with the mark just changed to that of defendant. When the hog left it was in his (Averett's) mark.

The defendant explained his possession of the hog by claiming it, and saying he got the same from one Anderson. Anderson testified that the hog came to his house, and while there he inquired of his neighbors as to whom it belonged, and among others of the defendant who, after looking at the hog, claimed it and carried it off. Defendant did not conceal the taking, but did it openly, carrying the hog off and putting it in his pen with his other hogs. He (the defendant) did not explain the altering the mark of the hog.

Defendant's counsel prayed the Court to charge the jury that to constitute larceny the act must be committed *"clam et secrete,"* and as the defendant took the property openly, there was no intent to conceal from the owner that he was the taker; and the owner knew who had his hog and against whom he could bring his action, and that it was no larceny.

His counsel further asked the Court to charge that if the color of right set up by defendant to the hog was a mere pretense and cover, still he could not be convicted of larceny, as he took the property above-board and in a way showing no intention to evade the law, and the owner was notified by this public taking who took his hog and whom to see for the purpose of recovering his property.

The Court refused the first and third instructions prayed, and charged the jury that larceny could be committed, though the act be done publicly and in the presence of a hundred witnesses. A thief might designedly assume the appearance of openness and boldness in order to cover his felonious purposes. A man picks your pockets in the court yard, and the moment he gets your money he shows it to you and the crowd, puts it into his pocket, tells you to bring your action, and carries off your property; this is larceny if it is done with a felonious intent. The question in this case is, did the defendant take the hog honestly believing it to be his own property? If so, he is not guilty. Or did he take it knowing that it was not his own, and with intent to convert it to his own use and defeat the right of the true owner? Was this claim which he set up to the hog a mere pretense, which he knew to be false? Did he take the hog and at the same time set up his claim to it, as a mere cover to protect himself from prosecution? Did he set up the claim so as to have an excuse in case he should be charged with taking what did not belong to him? If so, he is guilty.

The jury found the defendant guilty. Rule for a new trial; rule discharged. Judgment and appeal by defendant.

No counsel in this Court for defendant.

Hargrove, Attorney-General, contra, cited *State v. Scott,* 64 N. C., 586; *State v. Deal, Ibid.,* 270; *State v. Henderson,* 66 N. C., 627; *State v. Sowls,* 61 N. C., 151.

Intention is a matter for the jury. Scott's case, *supra.* Here his Honor left it to the jury to find as to defendant's intention. Larceny, although the taking was openly done; see Henderson's case, 66 N. C., 627; and *Rodman, Judge,* dissenting, in *State v. Deal,* 64 N. C., 270. Taking
(80) openly is not *conclusive* evidence that there was no
felonious intention, but only evidence to be considered by the jury.

If defendant took the property under color of right, believing it to be his own, he is not guilty, and so the Judge below charged. If his claim was a trick to evade the law he is guilty, and it was not error for his Honor so to charge.

RODMAN, J. It is difficult to see anything in the evidence upon which the counsel for the defendant could base the assumption that the taking was open and public, upon which he requested the Judge to instruct the jury that it could not be larceny.

The taking was not in the presence of the owner nor with his knowledge, nor was it public in any just sense of the word. It was from a stranger, none but the two being present, and his consent to part with the possession was obtained by a false pretense of ownership and with the intent to convert the hog to the defendant's own use. We think it was not error in the Judge to refuse the instructions asked for. We think also that there was no error in the instructions which he gave. Larceny may be committed in a crowd or in a public street. Persons are convicted daily of stealing in such places. It is true that if the thief is detected or supposes himself suspected he generally attempts to escape. But if he has no such apprehension, if he thinks the act has been so cleverly done as not to have been observed, he makes no such attempt, or he may, as his Honor says, be bold enough to admit his crime to the owner and refuse to return the goods. Is the act the less criminal on that account? It is impossible that the guilt of an act can depend upon the conduct of the actor after the act is complete. Such conduct is evidence of the intent, but does not directly and *of itself* characterize the act. That the defendant put the hog in his pen where it would be more or less open to public view, and that he altered the mark, were, with all the other circumstances of the case, (81) evidence of what his intent was at the time of the taking, but nothing more.

There is no error. Judgment affirmed. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

Cited: State v. Hill, 114 N. C., 782.

STATE v. STEPHEN BOBBITT.

1. A motion in arrest of judgment rests on error upon the face of the record, and any statement of the case by counsel tends to confuse instead of aid the Court, who are obliged to examine the whole record and pronounce judgment according to the very right and merits apparent thereon.

2. In an indictment for perjury the question whether or not one of the parties charged with an affray in the indictment upon the trial of which the oath alleged as false was taken, retreated "thirteen or twelve paces" before he returned the blows of the other party, is a material question, the "thirteen or twelve paces" being mere surplusage. So, too, is the question whether or not one of said parties was stricken "two or three times" before striking the other party, the number of times being surplusage where an averment of a blow would have sufficed.

3. An averment that the defendant "deposed and gave in evidence to the jury willfully and corruptly" amounts to a charge that he *swore* willfully and corruptly.

4. A traverse in an indictment pursuing the words of the defendant in taking the oath is sufficient in an indictment for perjury.

INDICTMENT for perjury, tried before *Watts, Judge,* at Fall Term, 1873, WARREN Superior Court.

The offense was charged in the following indictment:

"The jurors for the State, upon their oath, present, that at a Superior Court holden for the county of Warren on the second Monday after the second Monday of February, (82) A. D. 1872, at the court-house in Warrenton, in said county, before the Honorable *William A. Moore,* Judge of the said Court, one Wiley G. Coleman and one George Bobbitt were in due form of law tried upon a certain indictment then and there pending against them, by a certain jury of the Court then and there duly sworn and taken between the State and the said Wiley G. Coleman and George Bobbitt in that behalf, for that they, the said Wiley G. Coleman and the said George Bobbitt, on 1 January, A. D. 1872, with force and arms, at and in said county of Warren, did unlawfully assemble together to disturb the peace of the State, and so being then and there unlawfully assembled together, did mutually assault and beat each other, and to, with and against each other, in a public place, did fight and make an affray, to the terror and disturbance of divers of citizens of the State, then and there being in contempt of the State and its law and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oath aforesaid, do further present that upon the trial aforesaid one Stephen Bobbitt, late of said county, did then and there appear as a witness for and on behalf of the State against the said Wiley G. Coleman and George Bobbitt, and that the said Stephen Bobbitt did then and there, in open Court, in the court-house aforesaid, before the said Judge take his corporal oath, and was duly sworn upon the Holy Gospel of God to speak the truth and the whole truth and nothing but the truth touching the premises aforesaid (the said Judge then and there having competent authority and power to administer the said oath to the said Stephen Bobbitt), and it then and there became and was a material question upon the trial of the said Wiley G. Coleman and George Bobbitt whether the said Wiley G. Coleman did strike the said George Bobbitt before the said George Bobbitt struck the said Wiley G. Coleman; and that it became and was then and there another material question upon the trial aforesaid whether or not the said George Bobbitt retreated thirteen or twelve steps before he (83) the said George Bobbitt struck the said Wiley G. Coleman.

"And the jurors aforesaid, upon their oath aforesaid, present that the said Stephen Bobbitt, being sworn as aforesaid, wickedly devising and intending the due course of justice to pervert, and the said Wiley G. Coleman to injure, then and there, to-wit, on 28 February, A. D. 1872, in the county aforesaid, before the said Judge in open Court in the court-house aforesaid, on the said trial, falsely, knowingly, wickedly, willfully and corruptly, by his own act and consent, did depose and give in evidence to the jurors of said jury so sworn and taken between the said State and the said Wiley G. Coleman and the said George Bobbitt, to the effect and in substance following: 'Captain Coleman (meaning said Wiley G. Coleman) struck George (meaning said George Bobbitt) two or three times before George struck him' (meaning the said Wiley G. Coleman); and in substance and to the effect following: 'George (meaning the said George Bobbitt) gave back (meaning said George retreated) thirteen or twelve steps before he struck Captain Coleman' (meaning said Wiley

G. Coleman), *whereas*, in truth and in fact said Wiley G. Coleman did not strike George Bobbitt two or three times, or one time, before said George Bobbitt struck said Wiley G. Coleman. And the jurors aforesaid, upon their oaths aforesaid, do say that the said Stephen Bobbitt, at and upon said trial, to-wit, on 28 February, in the year last aforesaid, at and in the county aforesaid, in the said court-house and before said Judge (he, the said Judge, having then and there competent authority and power to administer the oath aforesaid to said Stephen Bobbitt), unlawfully and designedly did commit willful and corrupt perjury, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

On the trial the jury found the defendant guilty; and the counsel for the defendant moved in arrest of judgment upon the ground that the indictment was defective in the following particulars, to-wit: (84)

1. That it was not a material question "whether or not said George Bobbitt retreated thirteen or twelve steps" before the said George Bobbitt struck the said Wiley G. Coleman; nor whether Coleman struck Bobbitt "two or three" times before Bobbitt struck him, as the bill states.

2. The indictment does not charge that the defendant *swore* willfully and corruptly.

3. That the traverse in the bill of the statements of the defendant upon which the perjury is assigned is in the language of those statements, and therefore too broad, embracing circumstances wholly immaterial, and for this reason is calculated to mislead the jury.

His Honor allowed the motion and ordered the judgment to be arrested; from which order Solicitor Cox, on behalf of the State, appealed.

Attorney-General Hargrove, for the State.
No counsel in this Court for defendant.

PEARSON, C. J. A motion in arrest of judgment rests on error apparent upon the face of the record. It follows no statement of the case by the counsel is called for. Such statement tends to confuse and does not in any way aid the Court. We are obliged to examine the whole record and pronounce judgment according to the very right and merits apparent on the record.

The first ground for the motion in arrest is that the indictment avers "it became a material question whether Bobbitt retreated *thirteen or twelve* steps before he struck Coleman." It is true the indictment need only to have averred that it became a material question whether Bobbitt *retreated* before he struck Coleman; but it is manifest that the specification of "thirteen or twelve steps" is mere surplusage, and could in nowise prejudice the defendant. The same may be said of the averment as to striking *"two or three* (85) *times,"* when an averment of a blow would have sufficed.

2. The indictment does not charge that the defendant *"swore,"* but it does charge that he "deposed and gave in evidence to the jury willfully and corruptly." This amounts, especially after verdict and under the statute to cure formal defects and prevent refinements, to a charge that he *swore* willfully and corruptly.

3. The traverse of the statements of the defendant on which the perjury is assigned might have been more concise, but the defendant cannot complain, because it pursues his own words in taking the oath.

Error.

PER CURIAM. Judgment reversed.

Cited: State v. Swepson, 83 N. C., 586; *State v. Moore,* 84 N. C., 726; *State v. Lawson,* 98 N. C., 762; *State v. Watkins,* 101 N. C., 704; *State v. Harrison,* 104 N. C., 731.

STATE v. BENJAMIN WHITEHURST.

An indictment under the Act of 1866, chap. 60, in which it is charged that the defendant did unlawfully enter upon the premises of the prosecutors, he, the said defendant, having been forbidden to enter on said premises, and not having a license so to enter, etc., is sufficient.

CRIMINAL ACTION, misdemeanor (Bat. Rev., chap. 32, sec. 116), tried before *Moore, Judge*, at Fall Term, 1873, PITT Superior Court.

The defendant was brought to answer the following indictment:

"The jurors for the State, upon their oath, present that Benjamin N. Whitehurst, late of the county of Pitt, on 9 October, 1872, with force and arms, at and in the said county of Pitt, unlawfully did enter upon the premises of H. W. Martin and Edward Yellowly there situate; he, the (86) said Benjamin N. Whitehurst, having been forbidden by the said H. W. Martin to enter on said premises, and he, the said Benjamin N. Whitehurst, not having a license so to enter, contrary to the statute in such cases made and provided, and against the peace and dignity of the State."

On the trial the counsel for defendant moved to quash the indictment for the following reasons:

1. For that it does not aver that the defendant had no *bona fide* claim of right to the said lands; and

2. The indictment did not aver that Edward C. Yellowly, one of the owners of the land, had forbidden the defendant so to enter.

Upon the first point his Honor being of opinion that the entry of the defendant might be unlawful, *i. e.*, a civil trespass, yet made under a mistaken claim of right; and, therefore, the indictment should have negatived the claim of right.

Upon the second point his Honor, being also of opinion with defendant, ordered the indictment to be quashed and the defendant to go without day.

From this judgment the Solicitor prayed an appeal; appeal granted.

Hargrove, Attorney-General, for the State.
No counsel in this Court for defendant.

SETTLE, J. "No person, after being forbidden to do so, shall enter on the premises of another without a license therefor; and if any person, after being thus forbidden, shall so enter, he shall be deemed guilty of a misdemeanor." Acts 1866, chap. 60.

There is a further clause which declares that if any person, not being the present owner or *bona fide* claimant of such premises, shall willfully and unlawfully enter thereon and carry off any wood, etc., he shall, if the act be done with felonious intent, be deemed guilty of larceny, etc.

And there is a proviso by which a person may obtain a license to make search on the premises of (87) another for his estrays.

The defendant stands charged under the first clause of the act in the following bill:

"The jurors, etc., present that Benjamin N. Whitehurst, etc., did unlawfully enter upon the premises of H. W. Martin and Edward Yellowly, there situate, he, the said Benjamin N. Whitehurst, having been forbidden by the said H. W. Martin to enter on said premises, and he, the said Benjamin N. Whitehurst, not having a license so to enter, contrary to the statute," etc.

The defendant's counsel moved to quash the indictment:

1. For that it did not aver that the defendant had no *bona fide* claim of right to said land.
2. That the indictment did not aver that Edward Yellowly, one of the owners of the land, had forbidden the defendant so to enter.

His Honor, being of opinion with the defendant on both points, ordered the bill to be quashed; and the Solicitor appealed.

We think the indictment sufficiently certain to apprise the defendant of the charge against him, and also to protect him in any of his rights should he be forced hereafter to rely upon the plea of former acquittal or conviction.

Either a *bona fide* claim of right to the land, or permission from Yellowly to enter, would doubtless be a good matter of defense, but we see no good purpose which could be served by cumbering the bill with these averments. The tendency of the courts is to dispense with all unnecessary averments, thereby relieving the pleadings in both criminal and civil actions of much useless verbiage.

Let it be certified that there was error in the order quashing the indictment.

PER CURIAM. Judgment reversed.

Cited: State v. House, 71 N. C., 521.

(88)

STATE v. JESSE EASON and others.

An indictment, to be good, must set forth with plainness and certainty all the essential facts constituting the offense; the charge must be explicit enough to support itself, for if all the facts alleged in the indictment may be true and yet constitute no offense, the indictment is insufficient.

INDICTMENT for forcible entry and detainer, tried at Fall Term, 1873, GATES Superior Court, before *Albertson, Judge.*

The defendant, with five others, at Fall Term, 1871, were indicted for forcibly entering into a certain messuage and tract of land containing two hundred and seventy-five acres, "and being then and there in the peaceable possession of Elvy Russell," etc., and "then and there, with force and arms and with a strong hand, unlawfully, violently, forcibly and injuriously did expel, remove and put out the said Elvy Russell from the possession of the said messuage and tract of land, and the said Elvy Russell, so as aforesaid removed, expelled and put out from the possession of the same, then and there with force and arms and with a strong hand, unlawfully, forcibly and injuriously have kept out from the day," etc.

Another count charges that one Simeon Swain was in the peaceable possession of the said messuage and land, and was forcibly expelled as above set forth. Another count varies the statement, only by charging that Elvy Russell was seized in fee of said land, and was forcibly expelled, etc., and the last that Simeon Swain was seized, etc.

On the trial at Fall Term, 1873, the defendants pleaded not guilty, and a jury was impaneled, when his Honor permitted a juror to be withdrawn and the counsel for the defendants to move that the indictment be quashed, for the reason that it is not therein alleged the forcible entry was made in the presence of the owner or occupant of the premises. His Honor allowed the motion and ordered the (89) indictment to be quashed. Solicitor Bagley appealed.

Bagley, with whom was the *Attorney-General,* for the State, submitted that the motion to quash the bill should not have been allowed, because—

1. The bill is according to the precedents. Wharton Precs., Archb. Crim. Pl., title Forc. Entry.
2. An entry may be forcible by violence in the manner of entry, as by breaking the doors, though no person be therein, or perhaps by an act of outrage after entry, as by carrying off the party's goods. 1 Russ., marg. p. 287. Therefore, personal presence of the prosecutor or occupant is not necessary to constitute the offense and need not be alleged.
3. The allegation that the prosecutor was then and there in the peaceable possession and was forcibly and violently expelled is a sufficient allegation of presence.
4. The law distinguishes between forcible entry and detainer and forcible trespass on this point. 2 Bishop Crim. Law, title Forc. Tresp., sec. 491; same, Forc. Entry, sec. 484.
5. The bill is good for forcible detainer. Wharton's Precedents.

Smith & Strong, for defendants, argued:

The indictment charges a violent entry upon a tract of land in possession of the prosecutor and his dispossession thereof. It does not charge that he or any one was present at the time of the entry.

The taking must be charged to be from the actual possession, or it must be alleged the prosecutor was present. *State v. McDonell,* 8 N. C., 449; *State v. Mills,* 13 N. C., 420; *State v. Simpson,* 12 N. C., 504.

It is sufficient at common law to charge a forcible entry into a dwelling-house, but any violence inflicted on it short of an entry and detainer is not indictable unless the prose-

(90) cutor or some of his family were present, and it be so charged. *State v. Fort,* 20 N. C., 332; *State v. Whitfield,* 30 N. C., 315; *State v. Pollok,* 26 N. C., 305; *State v. Tolever,* 27 N. C., 452.

The gist of the offense of forcible trespass is a high-handed invasion of the actual possession of another—*he being present*—title is not drawn in question. *State v. McCanless,* 31 N. C., 376; to same effect, *State v. Walker,* 32 N. C., 234; *State v. Ross,* 49 N. C., 315.

BYNUM, J. This case is here on an appeal by the State from the order of the Court below quashing the indictment. The record shows that the case stood upon issues joined between the State and the defendants when the motion to quash was made and allowed.

The books do not agree that this motion can be entertained after plea pleaded, but the better opinion seems to be that it may be allowed at the discretion of the Court at any time before the verdict, but not after conviction, for then the proper motion is in arrest of judgment. Foster Cr. L., 261; 1 Bish. Crim. Prac., sec. 447.

The single question, then, before the Court is as to the sufficiency of the indictment, and as that contains four counts, and a general verdict of guilty would authorize the Court to pronounce judgment if any *one* of the counts is good, it follows that his Honor erred, unless all the counts are bad, for if some are good and some bad the motion and order should have been to quash the bad counts, and it was error to quash any one that is good. 1 Bishop Crim. Prac., sec. 449.

An indictment, to be good, must set forth with plainness and certainty all the essential facts constituting the offense; the charge must be explicit enough to support iself, for if all the facts alleged in the indictment may be true and yet constitute no offense, the indictment is insufficient. 1 Chit. Pl., 233 and 235; 1 Bish., sec. 48.

Apply these principles to this case.

The indictment is for forcible entry and detainer. The first count charges that the defendants, together with (91) other persons to the number of six or more, with force and arms, and with pistols, staves and other offensive weapons, into a certain messuage and tract of land (describing it) then and there being in the peaceable possession of Elvy Russell, unlawfully, violently and with a strong hand, did enter and then and there, with force and arms and with a strong hand, unlawfully, violently and forcibly did expel, amove and put out the said Elvy Russell from the possession of the said messuage, etc.

The second count is the same as the first, except that it charges the premises to be in the possession of Simeon Swain. The third count differs only in charging that Elvy Russell was seized of the premises, and the fourth in alleging that Simeon Swain was possessed of the premises for a term of years.

Two objections are made to the sufficiency of this indictment: first, because it does not charge the personal presence of the prosecutor at the time of the entry and detainer; and second, that the counts are repugnant.

The first objection is founded on a misapprehension of what facts are set forth in the bill, for the personal presence of the prosecutor does plainly and sufficiently appear in the allegation that he was "then and there in the peaceable possession," and was "then and there violently, forcibly and with a strong hand expelled, amoved and put out of the said messuage," etc., which facts are wholly inconsistent with the idea that the prosecutor was absent at the time of his violent expulsion.

We are, therefore, not now called upon to say whether either an actual possession of the premises by the prosecutor, or his actual presence, is necessary to be alleged and proved in an indictment for forcible entry and detainer. For the same reason the cases cited for the defendants to show that the personal presence of the prosecutor must be charged to constitute the offense have no application; indeed they seem to apply only or mostly to forcible trespass, quite a distinct offense from this. The second objection, to-wit, repugnancy in the several counts, is equally untenable.

The rule here is that where the indictment contains charges that are actually distinct, and grow out of (92) different transactions, in such cases the Court will compel the State to elect, or will quash. But where it appears by the indictment, as it clearly does here, that the charges in the several counts relate to the same transaction, varied and modified merely to meet the probable proofs, the Court cannot either quash or compel an election. Whar. Am. Cr. L., secs. 416, 22, 23 and 518; *Kane v. People*, 8 Wend., 203; *State v. Haney*, 19 N. C., 390.

Approved precedents, long settled and generally used, are strong proof that the indictment is sufficient.

The form used in our case is copied from Arch. Cr. Pl., title Forcible Entry. See also, 2 Bish. Crim. Prac., sec. 329, and Whar. Prac.

This indictment is under the statute, and that it is a most wise and beneficial statute appears in the fact that although from its antiquity it has become a part of the common law, yet it is brought forward and re-enacted in the statute law of most if not all the States of the Union.

"None shall make entry into any lands and tenements, or term for years, but in case where entry is given by the law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary he shall be guilty of a misdemeanor." Rev. Code, chap. 49, sec. 1.

Judgment reversed and *venire de novo*.

PER CURIAM. Judgment reversed.

Cited: State v. Stamey, 71 N. C., 203; *State v. Morrison*, 85 N. C., 562; *State v. Jones*, 88 N. C., 678; *State v. Chambers*, 93 N. C., 604; *State v. Sheppard*, 97 N. C., 403; *State v. Miller*, 100 N. C., 545; *State v. Harris*, 106 N. C., 686; *State v. Flowers*, 109 N. C., 845; *State v. Robbins*, 123 N. C., 736.

WILLIAM M. BROWN v. JOSIAH TURNER, JR., and W. H. HOWERTON, Secretary of State.

1. The Act of 1869-'70, chap. 43, repeals the act establishing the office of Public Printer; and the Public Printer as now provided for is not an officer within the meaning of the Constitution.
2. When the question of the right or title to an office is put in issue, *mandamus* is not the form of action, the appropriate remedy being an action in the nature of a *quo warranto;* nor will *mandamus* lie when two persons claim the same duty adversely to each other against a third party.
3. Any person having a right to an office can in his own name bring an action for the purpose of testing his right as against one claiming adversely.

(*Hoke v. Henderson,* 15 N. C., 1; *Howerton v. Tate,* 68 N. C., 551; *Hill v. Bonner,* 44 N. C., 257; *Cotton v. Ellis,* 52 N. C., 545, cited and approved).

APPLICATION for a *mandamus,* heard before *Watts, Judge,* at chambers in the city of Raleigh, January, 1874.

In his complaint the plaintiff alleges that he has been duly appointed Public Printer by his Excellency, the Governor, and asks for a *mandamus* directed to the defendant Howerton the Secretary of State, commanding him to deliver the public laws, etc., to the plaintiff, and also praying that he be restrained from delivering the same to the defendant Turner. Howerton answers the complaint, raising no question of fact or law. Turner demurs to the complaint:

1. Because of a defect of parties plaintiff, for that the Attorney-General, in the name of the people of the State, should have brought the action.

2. Because the complaint does not state facts sufficient to constitute a cause of action, in this, that the Governor of the State has no right to appoint a Public Printer, and that the plaintiff has never been duly appointed Public Printer or contractor.

3. That *mandamus* is not the proper remedy for the case made by the complaint.

His honor at the hearing overruled the demurrer and gave judgment for tthe plaintiff, from which judgment defendants appealed.

Merrimon, Fuller & Ashe, and *Attorney-General Hargrove,* for appellants.

The case made by the complaint is "to try the title to an office," and *mandamus* does not lie. *Tate v. Howerton,* and *Mott v. Tate,* 66 N. C., 231; C. C., sec. 366, *et seq.*

If it be said that the place sought is not an office, and the Governor had a right to make a *contract* with plaintiff, and did so contract, then *mandamus* does not lie. Tappan Mandamus, 78; 4 A. & E., 949; *Ex-parte Pering.*

The plaintiff must show a clear legal title. Tappan Mandamus, 28.

His right is defective, as he was appointed by the Governor pending the session of the Senate without their concurrence. Const., Art. II, sec. —; *The People v. Forquer,* Breeze, Ill., 72.

The case of *Howerton v. Tate,* 68 N. C., 551, has no application, as the existing Senate did not pass the act originally, nor has it confirmed the selection of the present contractor.

The defendant Turner is a proper party (C. C. P., secs. 55 and 61), and the Court must pass on his rights.

The defendant Howerton has a discretion. *People v. Forquer,* above; Tappan Mandamus, 13.

The employment of printing the public laws and documents does not constitute an office. An office is an agency for the State. *Clark v. Stanly,* 66 N. C., 63; *U. S. v. Maurice,* Brock. C. C., 103, 113 and 114.

An employment by the State not connected with government, and not requiring any action as *agent for the*
(95) *State* is not an office. *Nichols v. McKee,* 68 N. C., 429; *Welker v. Bledsoe,* 68 N. C., 457.

There is nothing in the undertaking of the Public Printer connected with government or requiring the performance of any act as agent of the State. Battle's Revisal, chap. 97. See analogous cases—*Solomons v. Graham,* 15 Wall., 206; *Commonwealth v. Birnes.* 17 S. & R., 220: A printer of the laws of Congress is not an officer. *Ibid.*, 237, 238: If a printer is employed for any but mechanical purposes, his duties are official; but if a certificate of the accuracy of the publication be required, his duties are mechanical and not official—a mere contract.

The authenticity of the publication of North Carolina statutes must be certified by the Secretary of State. See Battle's Revisal, chap. 78, sec. 15, p. 644.

If the Public Printer were an *agent* to do the State printing, the State would be liable for the obligations contracted in the performance of the work. *Cook v. Irwine*, 5 S. & R., 497.

U. S. Laws, 2 Brightly Digest, title Printing, chap. 2, sec. 6, p. 796: A firm, it seems, may be Public Printer of Congress; perhaps a corporation.

Sections 16 and 17: Public printing of Congress and Executive Department seems to have been done by contract.

A firm or a corporation may well perform all the duties and undertakings of the Public Printer under this act.

The office of State Printer was abolished, chap. 43, Acts 1869-'70; the duties have since been performed, chap. 3, Acts 1870-'71, under contract. Between the dates of December, 1870, and February, 1872, there were no duties prescribed by law for the Public Printer.

The Legislature may contract in behalf of the State. Const., Art. V; *Mills v. Williams*, 33 N. C., 501.

The members of the printing committee are officers, under *Clark v. Stanly*. They may, it seems, contract when so authorized. U. S. Laws, 2 Brightly Digest, title Printing, chap. 3, sec. 21, p. 799. They are particularly authorized to contract by the Acts 1871-'72, chap. 180. (96)

The plaintiff has not been properly appointed; the vacancy is an original one, and there has been no confirmation by the Senate. *People v. Forquer*, above; *Nichols v. McKee*, 68 N. C., 429.

Smith & Strong and *Argo* and *Batchelor, Edwards & Batchelor*, for the plaintff.

Upon the complaint and demurrer arises three questions:

I. Is the position of Public Printer a public officer?

1. An officer is any one who has a duty concerning the public; the extent of his authority is not material, as it is the nature of the duty that makes him a public officer. Bac. Ab., title Off., sec. A; *Clark v. Stanly*, 66 N. C., 69; *People v. Bledsoe*, 68 N. C., 459; *People v. McKee, Ibid.*, 429.

(*a*) The duty must concern the public. *Ibid.*

(*b*) If prescribed by governmental authority, as by an act of the Legislature, it constitutes the position to which the duty is incident, an office. *United States v. Maurice,* 2 Brock., 96, 103.

The duties of the Public Printer are prescribed by an act. Bat. Rev., chap. 97.

(*c*) A bond is another incident of an office. *U. S. v. Maurice,* 2 Brock., 96.

(*d*) Likewise continuance. *Ibid.*

(*e*) The importance of the position and of the duties incident thereto, to a complete and just administration of government and to the public weal, the degree of necessity to the public, gives character to it in proportion as it is less or greater. The material interests of the public would not suffer if the grass in the Capitol Square were not mowed or the shrubbery not trimmed—no fundamental principle of organized society would be violated, and none of the general purposes of government thwarted.

The *law of the land* would be violated if the laws
(97) were not in due time published. Dec. Rights, secs.
17, 32; *Hoke v. Henderson,* 15 N. C., 1.

It is also made incumbent on the Legislature to publish the journal of its proceedings. Art. XI, sec. 18.

2. The striking out of the act the words *"office of Public Printer,"* and leaving merely "Public Printer," does not affect the character of the position, so long as the duties remain the same. *People v. McKee,* 68 N. C., 429.

3. The Public Printer is invested by the act with the discretion and power of an *agent;* he may do the printing or cause it to be done, and he shall "cause" the binding to be done. Bat. Rev., chap. 97, secs. 5, 12, 19, 20. This constitutes him an officer. *People v. Bledsoe,* 68 N. C., 459.

II. If an officer, was plaintiff's appointment legally made?

1. The previous action of the Legislature obviated the necessity of nominating to the Senate. *Howerton v. Tate,* 66 N. C., 231.

2. There was a vacancy. Turner, appointed 18 December, should have been appointed second day after meeting of Legislature. Rev. Code, chap. 93, sec. 1. Printer has been for three years chosen by Legislature, and therefore there had been no printer.

3. There was vacancy; the constitutional provision, as in-

terpreted by the Supreme Court, includes *original* vacancies. *People v. McKee,* 68 N. C., 493.

III. Will *mandamus* lie in this case?

1. The party to whom the *mandamus* must issue, if issued at all according to the prayer in the complaint, is the Secretary of State. It would be self-contradictory for the plaintiff to ask that the defendant Turner be commanded to perform an official act, and at the same time allege that he himself is the incumbent of the position to which the required act is incident. There is no controversy between the plaintiff and the defendant as regards the title to the office of Public Printer; the title comes only incidentally in question, as it does in every case where a *mandamus* is prayed; for before the writ can issue the prosecutor or applicant, now the plaintiff, must show a *legal right* to demand (98) the performance of the act from the party against whom the writ is prayed. Tappan Mandamus, 10-12; *State v. Jones,* 23 N. C., 129; *State v. Justices,* 24 N. C., 430.

The defendant Turner is made party for the purposes of injunction only; and though the effect of a *mandamus* to the Secretary of State would be indirectly to pass upon the defendant Turner's right to the office, it does not invalidate the proceeding. Tap. Man., 19; *Richards v. Dyke,* 3; A. and D. Q. B. N. S., 267, per *Patterson, J.:* We want "books and papers only." *People v. Dikeman,* 7 How., N. Y. P. R., 124, 128.

It is competent for a *mandamus* to issue to an executive officer to compel him to perform a merely *ministerial* act, one concerning which he has no discretion. *Cotton v. Ellis,* 52 N. C., 345; *Malpass v. Governor,* at this term.

2. In any view of the case it seems *mandamus* will lie. Though not the proper remedy to try the title to an office where the controversy is directly between the claimant and an *incumbent* where right is doubtful, yet where the appointment or election of the *incumbent* is merely colorable, and *a fortiori* where it is clearly void, *mandamus* is the proper remedy. Tappan Mandamus, 27, 231; *People v. Dikeman.* 7 How., N. Y. P. R., 124, 128; *Ibid.*, 129

The defendant Turner is not even a *de facto* officer. *Burke v. Elliot,* 26 N. C., 355, 361; *State v. Briggs,* 25 N. C., 357, 357. *Quo warranto* is, therefore, not proper remedy, for it proceeds upon the allegation that there is a "usurpation," or "intrusion into," or possession of an office, and an *exclusion* by the incumbent of the claimant. Bat. Rev., chap. 17, sec. 366, subdiv. 1.

3. In this case there is no other *adequate legal remedy.* The plaintiff could not bring detinue to obtain the papers, for though he recover them in such action he would get no pay for printing. *People v. Steele,* 2 N. Y., 397, 418.
(99) He could not bring trover, for there is no conversion, nor would he get pay. He could not bring action in nature of *quo warranto* against defendant Turner, for, by the Attorney-General's refusal to allow the State to be made party plaintiff, he is excluded from this remedy, it being discretional with the Attorney-General whether he will allow such action to be brought, and so plaintiff would be left remediless. *Peabody v. Attorney-General,* 22 S. C., 114. And Turner has never been inducted, not having taken oath prescribed in Art. VI, sec. 4, of Constitution. *Burke v. Elliott,* 26 N. C., 355, 361. Nor has he color of title. *Ibid.*

It would seem, therefore, that in behalf of justice and good government, the proceeding for a *mandamus* will lie. *People v. State,* Bar (S. C.), 397, 418, 419.

Bynum, J. To enable the plaintiff to recover, he must maintain three propositions:

1. That what he claims is a public office.
2. That he has the legal title to it.
3. That he is prosecuting his claim by the right form of action.

1. Is it an office?

Chap. 43, Acts of 1869-'70, enacts "That the office of State Printer be and the same is hereby abolished, and all laws and parts of laws in conflict with this act are hereby repealed."

Chap. 180, Acts 1871-'72, enacts "That the Joint Committee on Printing of the two Houses of the General Assembly" are directed and instructed to make, execute and deliver a contract for the public printing, on the part of the State," at the rates specified in this act.

There is an act positively abolishing the office of Public Printer, *eo nomine,* which, according to *Hoke v. Henderson,* 15 N. C., 1, is constitutional in form and substance, because it disturbs no vested right or term of an incumbent. But it is urged that this construction of the act abolishing the office left the State without the power of printing (100) and publishing the laws. Be it so. The mischief is the act of the Legislature, and cannot operate as a grant of power to the Executive to *create* an office as a remedy for legislative indiscretion. But that body did by the act of 1871-'72 undertake to repair the mischief done in abolishing the office, by making it the duty of a "joint committee" to contract for the public printing. To this it is replied that the Legislature had no power to make "contracts," because that is an executive function. Admit that, and that their contracts are void for the infringement, still it leaves the office abolished, and the argument is not advanced. But is it true that the making of a contract is an exclusive executive function? That will depend upon what are exclusive executive powers. To say that because a thing is a contract it is an executive duty, is begging the very question in dispute.

There is no magic in the word "contract" which appropriates it solely to executive uses. Where, in the Constitution, is the prohibition upon the Legislature to make a contract? We know that it both has, and does exercise, the right of making contracts. Indeed, all laws in one sense are contracts, express or implied, and derive their highest sanction from the faith we repose in them as such, and there is nothing in the nature of things which forbids the Legislature to become a contracting party.

But it is said that an office cannot be abolished by indirection, leaving all its duties to be performed by a person called a "contractor" of public printing.

As we said of the word "contract," we say that there is no magic in the word "office." When the Legislature created and called it an office, it was an office, not because the peculiar duties of the place constituted it such, but because the creative will of the law-making power impressed that stamp upon it; therefore, when that stamp was effaced by the repealing act of 1869-'70, it shrank to the level of an undefined duty. The authority that invested these duties with the name and dignity of a public office, afterwards divested (101) them of that name and dignity.

There being now no law of the land declaring it to be a public office, our next enquiry is, do the duties of the Public Printer constitute it an office?

The place is really *sui generis,* and therefore the ordinary *criteria* by which we distinguish and classify public offices can not aid us to a conclusion here. It occupies that neutral ground where it may "shade into" a legislative or executive function, without disturbing the harmony of either. It comes within the definition of a public office because its duties relate to the public and are prescribed by public law, but so may the duties of a contractor or workman upon a public building. It seems not to be an office, because all the duties of Public Printer as prescribed by law are mechanical only, as much so as those of a carpenter or a brick-mason, calling for neither judgment or discretion, in a legal sense, and which may be performed by employees, men, women or children, in or out of the State, and on his death every unfinished duty of the printer can and must be, under existing law, completed by his personal representative. If it is an office, there is no law prescribing the term or duration of it, and it may be held for life as well as a term of years, which puts it out of harmony with the whole genius and spirit of our political institutions, a conclusion which can be forced upon us only on the most evident necessity.

Assuming as most favorable to the plaintiff that this anomalous collection of duties has vibrated upon the dividing line between two departments, a closer view will show that it has finally assumed a state of rest upon the legislative side of the line. The office of State Printer, as such, was abolished in 1870. From that time to this each political party, when it gained the ascendancy in the Legislature, claimed and exercised the exclusive control over the public printing by their own election of, or contract with, the printer. In 1873 the question was raised in a direct proceeding for that (102) purpose before Judge Moore, and it was then decided by him, in a well-considered opinion, to be not an office, and that judgment was acquiesced in by the contestant and all the branches of the government. It would seem, then, that this action and acquiescence of all the departments of the government had fixed the true position of this place in a manner not to be shaken. There is nothing in the nature of the duties to be performed to excite the jealousy of the other departments, or to disturb the equilibrium of either one of the three co-ordinate divisions of the supreme authority of the State. While it is true that "the executive, legislative and supreme judicial powers of the government ought to be forever separate and distinct," it is also true that the science of government is a practical one; therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parts constitute one brotherhood, whose common trust requires a mutual toleration of the occupancy of what seems to be a "common because of vicinage," bordering the domains of each.

It would seem as natural for the department which enacts the laws to control the publication of its labor as for an author to secure the copyright of his work and to control its publication. Printing and publishing are necessary parts of the enactment of laws so essential that laws would be incomplete and valueless without being thus made known to those who are bound to observe.

We are not, therefore, disposed to go into a more curious and critical enquiry upon this question, where no great principle is involved and where such enquiries are more calculated to confuse than to answer any useful purpose. We hold that the Legislature has the right to let out the public printing by contract.

2. If this be an office, the next question would be whether the plaintiff's title can be valid without confirmation by the Senate, or whether it falls within the decision in *Howerton v. Tate,* 68 N. C., 551, from which it seems distinguishable. As we are of opinion, however, that it is (103) not an office, we will not pursue the enquiry, but pass to the next question.

3. Is the plaintiff prosecuting his claim by the right form of action? *Mandamus* is a proceeding to compel a defendant to perform a duty which is owing to the plaintiff, and can be maintained only on the ground that the relation has a present clear legal right to the thing claimed, and that it is the duty of the defendant to render it to him. If it appears from the complaint that two persons are claiming the same duty *adversely to each other,* against a *third* party, the writ does not lie (Tom. L. D., title Mandamus, 3 Bun., 1452), and that for the plain reason that the *title* must be decided between them

before the defendant can know to whom the duty or thing is due.

The plaintiff here alleges that the defendant Turner, on 18 December, 1873, entered into a contract with a joint committee of the two houses to do the public printing, and gave bond to the State for the performance of the duties according to law, and claimed the right to do the printing. That he, the plaintiff, afterwards, to-wit, on the 20th of the same month, was appointed Public Printer by the Governor of the State, gave the bond, took the oath of office and claimed the same duty as Turner from the defendant Howerton, the Secretary of State.

If the case rested upon this statement of the plaintiff himself, it would be conclusive against him. But Howerton, in his answer, states that when this demand was made upon him by the plaintiff, being unable to tell which of the claimants had the better title, he applied to his constitutional adviser, the Attorney-General of the State, to instruct him in his duties, and that he gave as his opinion that Turner had the better right, and was entitled to the printing matter. In refusing the plaintiff, the Secretary of State was fully justified, for to have complied would have been a flagrant violation of the duty of his office in failing to protect the property of the State. The law is not so unfaithful to itself as (104) to allow its agents to surrender its rights to doubtful claimants. A judgment in *mandamus* does not decide the title, for if the plaintiff obtained judgment against Howerton it would not estop Turner from bringing his action against the plaintiff Brown.

The right sought to be tried is not one between Brown and Howerton, but between Turner and Brown, yet the *mandamus* is against Howerton, a third party, who has no interest in the controversy except to know who is the rightful claimant, until which time no duty arises on his part and no action lies against him. We have labored diligently, and failed to find a single case in the books where one of two persons claiming the same office adversely to each other can by *mandamus* call upon a third party to render a duty which is owing by him to the rightful one only of the two.

The question of *title* is put directly in issue, and when that is the case *mandamus* is not the form of action, but the appropriate remedy is an action in the nature of *quo warranto,* not against Howerton, but against Turner. *People v. Olds,* 3 Cal., 167; 2 Term, 289; 3 John Ca., 379. It is true that the latter action cannot be maintained, unless there is an intrusion and user of the office by the defendant, and it is here alleged that Turner had not filled or used the office, and therefore the plaintiff was without remedy, unless by *mandamus.* But the authorities establish that entering into a contract and giving bond, or taking an oath of office, are acts which constitute such a user or intrusion as will support the action in the nature of *quo warranto.* Steph. Nisi Prius, 2441; *Rex v. Tate,* 4 East., 337; *Hill v. Bonner,* 44 N. C., 257; Mos. Mandamus.

But suppose Turner was out of the way, and the undisputed title of the office was in the plaintiff, is he entitled to the relief he asks upon the pleading? No stress is laid upon the fact that the action is not on the relation of the Attorney-General, for we are of opinion that under the liberal provisions of the C. C. P. any party having a right can sue in his own name in all cases, except when otherwise expressly provided. In modern practice *mandamus* is not a pre- (105) rogative writ, but an ordinary process in cases to which it is applicable, and every one is entitled to it where it is the appropriate process for asserting the right claimed. *Kentucky v. Dennison,* per *Taney, Chief Justice;* 24 How., 66; 12 Pet., 615; C. C. P., 381, 362.

Assuming, then, that the plaintiff can sue in his own name, especially under the circumstances of this case, the principle to be extracted from the case as applicable to public officers is this: *Mandamus* will lie where the act required to be done is imposed by law, is merely *ministerial,* the relator has a clear right and is without any other adequate remedy. Mos. Mandamus, 68. But it does not lie where *judgment* and *discretion* are to be exercised, nor to control the officer in the manner of conducting the general duties of his office. 2 Dillon Corp., sec. 665; 34 Pa., 496. In *Decatur v. Spaulding,* 14 Pet., 497, it was held that *mandamus* would not lie against the Secretary, because the duty required by the writ was executive, in which judgment and discretion had to be used, to-wit, in construing and passing upon an act of Congress. To the same effect is *Brashear v. Mason,* 6 How., 92; *U. S. v.*

Guthrie, 17 How., 284, where the Court says: "It has been ruled that the only acts to which the power of the courts by *mandamus* extends are such as are purely ministerial, as to which nothing like judgment or discretion, in the performance of the duties, is left to the officer." So when an office is filled by a person who is in by color of right, as we have shown by authority Turner to be, for the purposes of testing the title, a *mandamus* is never used, but a proper remedy is *quo warranto.* 20 Bach., 302; 7 Ga., 473; 2 Dun. & East., 259. The case of the *U. S. v. Seaman,* 17 How., 225, is an instructive one in point, and was this: There was a printer to the Senate and a printer to the House of Representatives of the United States, and a Superintendent of Printing to both houses, whose duty it was to receive and hand out all the printing, according to an act of Congress, which provided that when a document was ordered by both houses to be (106) printed, the entire printing of such document should be done by the printer of that house which first ordered it. On 31 January, 1854, the Commissioner of Patents sent in to the Senate that portion of his report relating to arts and manufactures, which the *Senate,* on the same day, ordered to be printed. On 20 March following the Commissioner sent to both houses the agricultural portion of his report, which the *House* first ordered to be printed. The printer to the Senate claimed that both reports constituted but one document, and that by virtue of the Senate order of 31 January he was entitled to the printing of the agricultural part, although it was first ordered to be printed by the House. The Superintendent refused to deliver it to the Senate printer, and *mandamus* was applied for to compel him. The Supreme Court held that *mandamus* would not lie, on the ground that the duty of the Superintendent required the exercise of judgment as to ascertain facts and draw conclusions. In delivering judgment, *Chief Justice Taney* says: "The rule is well settled that *mandamus* cannot issue in a case where discretion and judgment are to be exercised by the officer, and it can be granted only where the act required to be done is merely ministerial and the relator without any other adequate remedy. * * * Nor is there any reason of public policy or individual right why this remedy should be extended beyond its legitimate bounds to embrace cases of this description, for it would embarrass the operations of the executive and legislative departments of governments if the courts were authorized to interfere by this summary process in controversies between officers in their respective employments, whenever differences of opinion as to their respective rights may arise." *Marbrey v. Madison,* 1 Cranch., 64; *Kendall v. U. S.,* 12 Pet., 834; 2 Cowen, 444; *Ruside v. Walker,* 11 How., 272; *Cotton v. Ellis,* 52 N. C., 545.

Here Howerton was called upon to decide a grave constitutional question, in favor of one who claimed in the face of an act of the Legislature, the decision of a Judge, the deliberate opinion of the Attorney-General, and the (107) uniform practice of all the departments of the government up to that time. To say that *mandamus* will lie in such a case is wholly inadmissible.

Judgment reversed, demurrer allowed and case dismissed.

PER CURIAM. Judgment reversed.

RODMAN, J. I concur in so much of the opinion of *Justice Bynum* as holds that there is no such office as that of State Printer, and consequently that the plaintiff is not such an officer. With this opinion I did not conceive that the question of the appropriateness of the remedy was material, and I have not considered it.

SETTLE, J., dissenting. I do not propose to discuss the questions presented for decision; but I merely wish to state that I do not concur in the opinion of the majority of the Court, believing, as I do, that *Clark v. Stanly,* 66 N. C., 59; *People v. McKee,* 68 N. C., 429; *People v. Johnston, Id.,* 471; *People v. Bledsoe, Id.,* 459; *People v. McGowan, Id.,* 520, and *Howerton v. Tate, Id.,* 546, were well decided, and applying the principles upon which those cases are made to stand to the case before us, I am forced to the conclusion that the Public Printer is an officer of the State, and that consequently the Legislature cannot either directly or indirectly appoint a person to discharge the duties of that office.

It is true that the Legislature has professed to abolish *the office* of Public Printer, just as they professed to abolish the offices of the boards of directors for the asylum, etc., but they have left all the important duties heretofore performed by the Public Printer, *an officer,* to be performed by the Public Printer a *contractor.*

Can it be that such a play upon a word can change the essence, the substance of a thing? It may be found that this Court has gone too far in the cases referred to. I do (108) not think so; but certainly the opinion of the majority of the Court in this case cuts us loose from our moorings and puts us at sea again.

READE, J., dissenting. I do not concur in the decision of the Court. It significantly ignores the recent cases of *Clark v. Stanly, People v. Bledsoe, People v. McKee, People v. Johnston,* etc., which were supposed to have settled the vexed question as to what are offices in North Carolina, and who was the appointing power, and puts everything at sea. There is no more important business than that of printing and publishing the laws and the reports of officers and institutions. It is expressly required by the Constitution. It is prescribed in detail by several acts of the Legislature prior to our present Constitution, and it was also prescribed by law. The Public Printer was elected by the Legislature, with a provision for the Governor to fill vacancies. It is conceded that it was then an office, and that it continued to be an office, both under the old Constitution and under the new until 1869-'70, when the Legislature passed an act abolishing the office, and the decision is put upon the ground that the Legislature did then abolish the office, and that it had the power to do so, and that since that act it has not been an office, but a mere ministerial business, which may be done under contract by any one with whom the Legislature may contract, and by his administration, if he die. I admit that the Legislature did abolish the office as said; and for the sake of the argument I admit that it had the power to do so, but it is overlooked that what the Legislature abolished in February, 1870 (probably to get clear of an objectionable incumbent), it re-established in the next month, March, 1870, so that we have this case: an office exists on Monday, is abolished on Tuesday, and is set up again on Wednesday. What is it on Thursday? An undefined duty, "mechanical," says the decision. *An office,* say I. What practical effect is the abolishing act? It was thought to be of no effect, and therefore is not brought forward in Battle's Revisal. It was admitted by the Legislature that the office was set up again by the act (109) of March, 1870, because, in the next year, 1870-'71, they passed another act abolishing it again, which would have been a vain thing if there had been nothing to abolish. But the abolishing act of 1870-'71 is also omitted in Battle's Revisal. And why? Because the office was re-established by several acts which are brought forth in Battle's Revisal, title Public Printing, and the duties of Public Printer, as now prescribed by law, are substantially the same as they were before the present Constitution, and as they may be found in the Revised Code, title Public Printing. If it was an office then, why is it not an office now? In the cases cited above, the Legislature abolished the officers of the board of directors for the institutions, and created another board, the "Board of Trustees," but the powers and duties of the board were left as before, and therefore it was decided that the abolition amounted to nothing, that the office continued, or, if abolished, was set up again, but now the decision is that the Legislature may kill, but cannot make alive.

I have said that since the act abolishing the office it has been created again, and exists now with almost precisely the same duties and powers as for a great many years. Compare Battle's Revisal, title Public Printer, with Revised Code, same title. The two principal alterations are that the public binding is not added to the printing, and the power to fill vacancies is not given to the Governor, so that now, if the Governor has neither the power to appoint to the office nor to fill a vacancy, we have this case: The Public Printer is elected in January and dies in February, the office is vacant until an administrator qualifies the whole year; then the office is vacant for the whole year, and no public printing can be done by anybody, although the Constitution requires that it shall be done, and although it is more important to print and publish the laws than to make them; certainly such ought not to be the law.

Cited: Sneed v. Bullock, 77 N. C., 283; *O'Hara v. Powell,* 80 N. C., 109; *Saunders v. Gatling,* 81 N. C., 301; *Haymore v. Comrs.,* 85 N. C., 271; *Ellison v. Raleigh,* 89 N. C., 130; *Burton v. Furman*, 115 N. C., 169; *Russell v. Ayer*, 120 N. C., 197; *Lyon v. Comrs.*, *Ib.*, 243; *Wilson v. Jordan*, 124 N. C., 709; *Greene v. Owen*, 125 N. C., 215.

(110)

DANIEL T. JORDAN v. HENDERSON COFFIELD and wife, MARY E.

1. Necessaries for which an infant may become liable not only includes such articles as are absolutely necessary to support life, but also those that are suitable to the state, station and degree of life of the person to whom they are furnished.

2. The plaintiff, a merchant, furnished the *feme* defendant during her infancy and just before her marriage with certain articles, among which was her bridal outfit and a chamber set: *Held*, that it was not error in the Judge below to charge the jury if they believed that the articles furnished were actually necessary and of a fair and reasonable price, the plaintiff was entitled to recover.

3. The obligation of the mother is not the same as that of the father to support infant children; and the weight of authority, both in this country and in England, is against the liability of the mother to this burden, except under peculiar circumstances.

(The cases of *Smith v. Young*, 19 N. C., 26; *Hyman v. Cain*, 48 N. C., 111, cited and approved).

CIVIL ACTION, commenced in a Justice's Court, from whence it was carried by appeal to the Superior Court of CHOWAN, where it was tried before *Albertson, Judge*, Fall Term, 1872.

Plaintiff seeks to recover from defendants an account for $104.25, with interest, under the following state of facts:

The defendant Coffield and wife, Mary E. (formerly Mary E. Gaskins), intermarried in January, 1870; and the account of the plaintiff, the basis of this action, is for necessary articles furnished the wife just before her marriage, consisting of her bridal outfit, and among other things a suite of chamber furniture costing $55; all which articles were received and used by defendants, and still are in their service and use, except such of the same as are worn out.

It was proved that the defendant, Mary E., was the daughter of John and Mary P. Gaskins; that John died intestate in 1864, leaving a widow and two children, the *feme* defendant and a younger sister; that up to 1869, articles (111) furnished the *feme* defendant and her sister by the plaintiff who was a merchant in Edenton, were charged to the mother; but since 1869 the plaintiff charged whatever was purchased by or for them directly to themselves, for the reason that he knew that the mother was in embarrassed circumstances, owing him at the time a debt of several hundred dollars, to secure which he had to purchase a mortgage made by her to another person. When the mother died, in the fall of 1871, her estate was insolvent. The plaintiff further proved that at the time he changed the manner of charging the articles purchased by the *feme* defendant and her sister he informed her and her mother of the fact, and that after being so informed she (the *feme* defendant) sent for him and ordered the goods charged in the account sued upon; that the articles were necessaries and suitable for a person in the social condition of the defendant, Mary E., and that payment therefor had been frequently demanded and refused. The plaintiff's clerk testified to the same thing as to the goods being necessaries, and further that he delivered and charged the most of them himself, and that the account was correct.

On the part of the defendant it was proved that at other stores in Edenton articles furnished the *feme* defendant and her sister was charged to the mother; that they, the daughters, had no other estate than an interest in land descended from their father, upon which the mother had dower, and from which they derived no income; that there was $1,000 in the hands of an attorney in Tennessee belonging to the sisters, and that their mother, who was administratrix of her deceased husband, had recovered some $840 belonging to the estate, and in 1868 another $1,000; and that the estate was worth about $4,000, all of which facts were known to the parties.

Upon the cross-examination the plaintiff showed that the accounts referred to were for small amounts, some of which were still unpaid. Other witnesses proved that the credit of the mother in 1869-'70 was failing, whilst some testified that in 1869 she was regarded as solvent. The defendant, Coffield, swore that no demand for the payment of the (112) account had ever been made on him; on his cross-examination he stated that the articles charged were now in the possession and use of himself and wife. It was also proved that the bond of the administratrix, the mother, was worthless.

His Honor charged the jury that if they believed that the articles furnished by plaintiff were actually necessary and of a fair and reasonable price, then the plaintiff was entitled to recover. Defendants excepted.

The jury returned a verdict in favor of the plaintiff for the sum of $123.21, of which $104.25 is principal money, bearing interest from the 18th day of November, 1872. Judgment in accordance with the verdict, and appeal by defendants.

Gilliam & Pruden and *Smith & Strong,* for appellants.
A. M. Moore, contra.

(113) SETTLE, J. The plaintiff, who is a merchant, furnished to the *feme* defendant certain articles just previous to her marriage, consisting of a chamber set and other articles constituting her bridal outfit, amounting in all to the value of one hundred and four dollars and twenty-five cents. It is conceded that the chamber set is still in the possession and use of the defendants.

To the plea of infancy the plaintiff replies, necessaries.

The evidence in regard to the estate and degree of the *feme* defendant is set forth in the record.

His Honor charged that if the jury believed the articles furnished were actually necessary and of a reasonable price, the plaintiff was entitled to recover. The record simply states that the defendant excepted. But we see no objection to this charge.

In *Smith v. Young,* 19 N. C., 26, *Daniel, Judge,* states the rule governing such cases with great clearness. He says: "The question whether necessaries or not is a mixed question of law and fact, and as such should be submitted by the Judge to the jury, together with his directions upon the law. Whether articles furnished to an infant are of the classes for which he is liable is matter of law; whether they were actually necessary and of reasonable price is matter of fact for the jury."

In addition to the authorities cited by the learned Judge in support of this proposition, we would add the recent case of *Ryder v. Wombwell,* decided in the Court of Exchequer and reported in *Law Reports* 1868-'69, page 31.

His Honor is to be understood as holding the articles furnished to be of the class for which the defendant would be liable, and it appears from the record (114) that there was evidence, which was well left to the jury and from which they might have properly found that the articles were necessary to one in the degree and condition of the defendant, and that they were of reasonable price. There is an exception to the general rule that an infant is incapable of binding himself by a contract made, not in favor of tradesmen, but for the benefit of the infant himself, in order that he may obtain necessaries on credit. As is well said in *Hyman v. Cain,* 48 N. C., 111, "infants had better be held liable to pay for necessary food, clothing, etc., than for the want of credit, to be left to starve."

Nor are we to understand by the word necessaries only such articles as are absolutely necessary to support life, but it includes also such articles as are suitable to the state, station and degree in life of the person to whom they are furnished. *Peters v. Fleming,* 6 M. & W., 46.

Although the point is not distinctly made upon the record, yet it would seem that the defendant relies somewhat upon the idea that her mother was bound to support her, notwithstanding the fact that she had some estate of her own. The obligation of the mother is not the same as that of the father to support infant children, and the weight of authority, both in this country and in England, is against the liability of the mother to this burden, except under peculiar circumstances. 1 Parsons Cont., 5th Ed., p. 308.

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

Cited: Turner v. Gaither, 83 N. C., 362; *In re Lewis,* 88 N. C., 33.

(115)

STATE on the relation of GEORGE W. FOUST v. R. M. STAFFORD and others.

In an action against a sheriff for negligence and not using due diligence in endeavoring to collect a judgment, the execution on which had been regularly placed in his hands, the defense being that the execution was held up by direction of the plaintiff; and on the trial the jury find all issues in favor of the defendant: *Held,* that it was no ground for a new trial that the jury failed to give the plaintiff nominal damages under the instruction of the Court.

CIVIL ACTION, tried before *Tourgee, Judge,* and a jury, Fall Term, 1871, GUILFORD Superior Court, and afterwards, to-wit, 26 April, 1872, determined by his Honor at chambers.

The plaintiff brought this action against the defendant, Stafford, who was sheriff of Guilford, and others, his sureties, alleging that in 1867 he (the plaintiff) obtained a judgment in the Court of Pleas and Quarter Session of that county against one Wharton and one Coble for $313.50 and costs; that he caused to be issued, 17 December, 1867, a *fieri facias* on said judgment, which came into the hands of the defendant, Stafford, who, from the want of due diligence and by reason of negligence, failed to make the money, whereby it was lost to the plaintiff.

In his answer the defendant, Stafford, admits the receipt of the execution, and the fact that at the time the judgment might have been collected out of Coble, one of the judgment debtors (Wharton being admitted by all parties to be insolvent), and relies as a defense, and so alleges, that the execution was held up by the direction of the plaintiff until Coble himself became insolvent.

On the trial the jury found all the issues in favor of the defendants, when the plaintiff gave notice of an appeal to this Court. The record sent up then states:

"Afterwards, to-wit, 26 April, 1872, at chambers in Greensboro, the following proceedings were had:

SUPERIOR COURT—Guilford County.

At Chambers at Greensboro, 26 April.

State, on the relation of G. W. Foust, Plaintiff,

against

R. M. Stafford, Defendant, and others.

In the action a verdict and judgment having been rendered in favor of the defendants at Fall Term, 1871, and the plaintiff having moved at the trial term for a new trial on the ground that the jury should have rendered a verdict in favor of the plaintiff for nominal damages, according to the instructions of the Court, and said motion being continued regularly at chambers from time to time until this time: on consideration of the motion, the Court being satisfied that the relator, according to the charge of the Court, was entitled to a verdict for nominal damages and no more, and the defendants offering to pay a penny and costs, and forthwith doing the same; thereupon it is adjudged by the Court that the motion for a new trial be overruled. A. W. TOURGEE, *Judge, etc.*

From which judgment the plaintiff appeals, and assigns for error the refusal of the Judge to grant the new trial asked for on the statements and admissions contained in the order (judgment) itself.

Scott, for appellant.
Dillard, Gilmer & Smith, contra.

SETTLE, J. This is an action upon a sheriff's bond, in which he and his sureties are sought to be held liable for his failure to collect, under a *fi. fa.* placed in his hands, a debt of $313.50, with interest and costs, due by judgment from T. G. Wharton and David Coble, the defendants in the execution, to the relator.

It appears from the complaint in this action that at the time of the rendition of the judgment against Wharton and Coble the defendant Wharton was wholly insol- (117)

vent and that he has continued so ever since; and further, that Coble soon thereafter became wholly insolvent; but it is insisted that "by want of due diligence and by the reason of the negligence" of the defendant, Stafford, the relator has lost his debt.

The defendant, Stafford, admits that when the execution came into his hands the money might have been made out of at least one of the defendants, but he avers that the execution was withheld and indulgence given by the direction of the relator.

Upon these pleadings the parties go to the jury, who find all issues in favor of the defendants.

So we are to take it that the defense relied upon is true, and if so, it was a complete defense, and the verdict should not have been disturbed.

But the plaintiff moved his Honor for a new trial, upon the ground that the jury had not given nominal damages in accordance with the instructions of the Court, and thereupon his Honor, as appears from the judgment which he signed and which is sent by counsel who settled the case to this Court, "being satisfied that the relator, according to the charge of the Court, was entitled to a verdict for nominal damages, and no more," permitted the defendant to pay a penny and the costs, and overruled the motion for a new trial.

Thereupon the plaintiffs appealed. There is no assignment of errors in the charge of his Honor, and, as already said, as far as we can see from the case agreed by counsel, he might have well refused to disturb the verdict in any manner.

However, since he did so, and the plaintiff was still dissatisfied, the charge of his Honor should have been set forth, or at least there should have been some assignment of errors in order that this Court might pass intelligently upon the case.

Upon the record before us we must say that there is no error.

PER CURIAM. Judgment affirmed.

BANK OF CHARLOTTE v. R. F. and J. M. DAVIDSON.

1. A promissory note payable in Confederate currency in 1863 is a contract to pay *money*, and not a contract to deliver specific articles: *Hence*, a tender of the money at the day does not satisfy the debt, but only stops the interest.
2. In an action upon such note, where the money tendered had been refused: *It was held* that although the defendant need not bring into Court the Confederate money, now worthless, he should have accompanied his plea by a payment into Court of the statutory equivalent for such Confederate money: *Held further*, that the plaintiff was entitled to interest from the date of the service of his summons.

(*Wooten v. Sherrard*, 68 N. C., 334; *Cable v. Harding*, 67 N. C., 172, cited and approved).

CIVIL ACTION (on a note given in 1863), tried before *Moore, Judge,* July (Special) Term, 1873, MECKLENBURG Superior Court.

Upon the verdict the Court gave judgment for the scale value of the note at its date, with interest from the rendition of the judgment. Plaintiff appealed.

The facts pertinent to the decision in this Court are fully stated in the opinion of *Justice Rodman.*

J. H. Wilson, for appellant.

As to tender and refusal of payment in Confederate money, see *Terrell v. Walker,* 65 N. C., 91; same case, 66 N. C., 244.

A plea of tender is of no avail unless accompanied by a payment of money into Court of the amount admitted to be due. *Jenkins v. Briggs,* 65 N. C., 159.

The Courts of this State have habitually treated notes payable in Confederate money as having all the attributes of promissory notes, and a tender of the like money in payment of same, which the payee refuses to receive, will not bar the debt. *Wooten v. Sherrard,* 68 N. C., 334. See Bat. Rev., chap. 34.

Barringer and *McCorkle & Bailey, contra.*

Cable v. Hardin, 67 N. C., 472, has this head-note, exactly in point:

"Where a note was given in 1862 for a loan of Confederate money, and afterwards, in 1864, the obligor tendered the amount due in Confederate currency, a portion of which was received and a new note given for remainder: *It was held,* that the old debt must be regarded as paid and the transaction a new loan and the scale applied as of that debt."

In the present case the note was dated 26 October, 1869, and was made due and payable sixty days after 7 November, 1863. The jury found, and the case shows, that this note was in renewal in part of two other notes then falling due, also payable in Confederate currency, one of $15,000, dated 28 February, 1863, and one of $10,000, dated 23 May, 1863, the residue of said two notes being then paid off.

The jury further found, and the case also states, that it was part of the contract that it was to be paid in Confederate currency, and "that the same was duly tendered at the maturing of the note."

The rule as to bringing the money into Court can have no application to a contract of this kind. That rule applies when a defendant admits a specific subsisting debt, payable in a currency recognized by the Court and which the party also tendered to the Court. But in all Confederate contracts a public statute intervenes and applies new rules for ascertaining the value of such contracts, and makes them payable in another and a very different currency. The *dicta* in several late cases would seem to apply the old rule. But consider *Johnston v. Crawford,* 61 N. C., 342; *Terrell v. Walker*, 65 N. C., 91.

RODMAN, J. On 26 October, 1863, the defendant was indebted to the plaintiff by one note for $15,000, dated and made 28 February, 1863, and by another for $10,000, dated and made 29 May, 1863. On said 26 October, de-
(120) fendant paid all of the $15,000 note except $2,820.50,
and all of the $10,000 note except $2,179.50 (the two sums remaining unpaid amounting to $5,000). In payment of this balance the defendant gave the note sued on in this action, which was dated on said 26 October and payable at sixty days after 7 November, 1863.

It was agreed at the time that the note should be paid in Confederate currency, but this agreement was not inserted in the note, which was payable in dollars generally. On the day of its maturity the defendant tendered to the plaintiff the full amount of the note in Confederate currency, which the plaintiff refused to receive. The summons in this action was issued 17 December, 1868, returnable to Spring Term, 1869, of Mecklenburg Superior Court. It does not appear on what day the summons was served.

On this case three questions are made:

1. What was the effect of the tender on 7 January, 1864?
2. At what date is the legislative scale to be applied?
3. From what time does interest run on the principal debt?

1. We have recently said in several cases that contracts such as that now before us have been always regarded by the Legislature, and by this Court, as contracts to pay *money,* and not as contracts to deliver specific articles (*Wooten v. Sherrard,* 68 N. C., 334), and that consequently the effect of a tender refused is not to discharge the debt, but merely to stop the interest. That this is the law of contracts to pay money ordinarily is settled. It is so laid down in all the text-books, and must follow from the rule that a plea of tender must aver that the defendant has always been ready and willing to pay, and must be accompanied by a payment of the money into Court for the use of the plaintiff. An omission to pay the money into Court makes the plea a nullity, and plaintiff may sign judgment. *Bray v. Booth,* 1 Barnes, 131; *Kether v. Shelton,* 1 Stra., 638.

There are two cases, however, so directly decisive of (121) the question, as to deserve being quoted. *Dent v. Dunn,* 3 Camp., 296, was an action on two notes. The defendant had given her agent a sum of money for the purpose of taking them up; the agent went to the plaintiff and offered to pay principal and interest on having the note delivered to him, but the plaintiff, having mislaid the notes, could not deliver them. The agent afterwards failed with the money in his hand. The notes were not discovered until a short time before the commencement of the action. *Lord Ellenborough* said a tender could not extinguish the debt, but the interest ought to stop from the offer to pay.

In Dyer there are several cases on the effect of a tender in debased money, but none of them appear to have been decided except *Pong v. John de Lindsay,* 82a, which is thus digested:

"If at the time appointed for payment a base money be current in lieu of sterling, tender at the time and place of that base money is good, and the creditor can recover no other." Probably the base money was still current at the time of the trial. See also *anonymous case,* p. 72. These old cases are referred to rather as being curious than as authorities.

In *Dixon v. Clark,* 5 Man. Gr. & Scott, C. B., 365 (57 E. C. L. R.), which was elaborately argued, *Wilde, C. J.,* says: "In actions of debt and assumpsit the principle of the plea of tender, in our apprehension, is that the defendant has been always ready, *toujours prist,* to perform entirely the contract on which the action is founded, and that he did perform it, as far as he was able, by tendering the requisite money—the plaintiff himself precluding a complete performance by refusing to receive it. And as in ordinary cases the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready, *uncore prist,* but must be accompanied by a *profert in curiam* of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the *uncore prist* and *profert in curiam*), yet he will answer the action in the sense that he will (122) recover judgment for his costs of defense against the plaintiff, in which respect the plea of tender is essentially different from that of payment of money into Court."

With respect to the averment of *toujours prist,* if the plaintiff can falsify it he "avoids the plea altogether." "Consequently a plea by the acceptor of a bill or the maker of a note of a tender *post diem* is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always ready to pay, not only from the time of the tender, as the plea was in *Hume v. Peploe,* 8 East., but also from the time when the bill or note became payable." For American cases see *Raymond v. Bernard,* 12 Johns, 274; 2 Pars. Bills and Notes, 621; *Shields v. Lozear,* 34 N. J. Law; 5 Broom, 496.

The answer to this question is governed by the decision in *Cable v. Hardin,* 67 N. C., 472. The scale must be applied at the date of the note. The former debts were discharged by the accord and satisfaction upon which the note sued on was given. That such a transaction is a discharge and satisfaction of the old note, see Am. Note to *Cumber v. Wane*, 1 Smith L. C., 458, citing *Sutton v. Albatross*, 2 Wall. & 10 Sergeant & Rawle, 75; *Bank v. Daniel*, 12 Pet., 34; 4 J. J. Marshall, 1.

As there was a constant depreciation of Confederate currency, this rule may seem a hard one. But we must look to the intention of the parties at the time. There can be no doubt that the parties intended to discharge and destroy the old debt and create a new one; and although they did not then foresee all the consequences, yet we must give to their contract its legitimate consequences, otherwise we should now be undertaking to make a contract for the parties which they did not make.

3. This point has not before been presented to us. We think, however, that by the application of admitted principles we can answer it equitably.

A tender after the day has no effect, because the (123) defendant cannot sustain the averment in his plea that he was always ready, and a plea which averred that he had always been ready since the tender would be had. *Turner v. Goodwin*, Stark, 150; *Habdeny v. Tuke*, Willis, 682; Say, 18; *Dixon v. Clarke, supra*. For the same reason, if after the tender the creditor demands payment, which is refused, the interest runs at least from the demand. *Spybey v. Hyde*, 1 Camp., 181; 5 B. and A., 630; *Coore v. Callaway*, 1 Esp., 115.

Ordinarily a plea of tender must, as we have seen, be accompanied by a payment into Court; and hence in the case of an ordinary contract to pay money this question could never arise. We agree that as the Confederate currency had become entirely worthless before this action was brought, there was no reason why that should have been brought into Court along with the plea of tender. But the defendant could have accompanied his plea by a payment into Court of the statutory equivalent for the Confederate currency, to-wit, its value according to the scale; and it was his duty to do so. If this action had been brought before the legislative adoption of the scale it might have been different, as in that case the defendant could not have known with certainty the amount of his indebtedness, and the plaintiff's demand would have been in the nature of unliquidated damages, in which a plea of tender is impracticable. But in 1868 the sum due to the plaintiff might have been precisely known. We think plaintiff is entitled to interest from the service of the summons, or as that is not stated it must be presumed to have been soon after the issue of the summons from the date of its issue.

The judgment below is partly affirmed and partly reversed, and judgment will be entered in this Court in conformity with this opinion. Neither party will recover costs in this Court.

PER CURIAM. Judgment accordingly.

Bynum, J., did not sit.

Cited: Stokes v. Cowles, post, 125; *Tate v. Smith, post,* 686; *Bank v. Stenhouse, post,* 705; *Love v. Johnston,* 72 N. C., 420.

(124)

RACHEL STOKES' administrator v. JOSIAH COWLES and others.

The value of a promissory note, dated March, 1863, payable on demand, is the sum due upon applying the legislative scale at the time the note was made, and not when payment was demanded.

(See *Bank of Charlotte v. Davidson*, next preceding).

CIVIL ACTION (to recover a promissory note), tried before *Albertson, Judge,* August (Special) Term, 1873, ROWAN Superior Court.

At Fall Term, 1870, the case was submitted to a jury, who returned a verdict in favor of the plaintiff for $2,000, the full amount of the note sued upon with interest from the date thereof. The note was dated 2 March, 1873, and made payable on demand. In their verdict the jury, in applying the scale to estimate the value of the note in currency, adopted the time of the demand, to-wit, March, 1864, as the proper time to ascertain its value; and the plaintiff, insisting that the scale should be applied at the date of the note, moved for a judgment in accordance therewith, notwithstanding the verdict. This motion was continued until the last August Term, when his Honor refused the plaintiff's motion, whereupon he appealed.

McCorkle & Bailey, for appellant, cited and relied upon the Act of 1866-'67, chap. 44; *Sanders v. Jarmin,* 67 N. C., 86; *Cable v. Hardin, Ibid.,* 472; *Terrell v. Walker,* 66 N. C., 250; also *Hamilton v. Person,* 3 N. C., 236; *Bruton v. Bullock,* 1 N. C., 535..

No counsel for defendant in this Court.

RODMAN, J. There is nothing in this case to distinguish it from the case preceding, *Bank v. Davidson, ante,* 118, and numerous other cases of a similar character. The legislative scale must be applied at the date of the note. The Legislature of 1866 thought it equitable that in all cases, whether upon loans of Confederate money or on purchases of (125) property *the borrower or purchaser should repay the value which he received.* Such contracts were not looked on as contracts to deliver stocks or specific articles of fluctuating value, where the damages for the breach would be the price of such articles on the day of delivery. We have felt ourselves bound by the intent and language of the act, and we have no reason to doubt that the assumed equity upon which the act was founded was the one really and properly applicable to such cases.

We do not think that it makes any material difference that the note sued on was payable on demand, or earlier, at the option of the makers, or that it expressed on its face that it was payable in Confederate money.

Judgment below reversed, and judgment may be entered here in conformity with this opinion.

PER CURIAM. Judgment reversed.

Cited: Smith v. Smith, 101 N. C., 472.

JAMES McCOY v. WILLIAM C. WOOD, administrator.

A and B, in January, 1872, entered into a verbal agreement that B should cultivate A's farm that year, A furnishing the teams and B labor; A was also to advance money during the year to pay the laborers, which advances were to be a lien on B's share of the crop, and when the crop was gathered A was to have two-thirds thereof and B one-third. In September B assigned to C, the plaintiff, his interest in the crop to secure a debt, and during the same month died; A administered on B's estate and filed a lien on his part of the crop to secure the amounts he had advanced for labor and for gathering the crop after B's death: *Held*, that A, the defendant, was entitled to be paid the money advanced for housing the crop, and that for the amount paid to the laborers he was subrogated to their right of an inchoate lien on the crop in preference to the claim of the plaintiff.

(Cases of *Smith v. McLeod*, 38 N. C., 390; *Sherwood v. Collin*, 14 N. C., 380; *Warren v. Woodard, post*, 382, cited and approved).

(126) Civil action (commenced by warrant and carried up to the Superior Court of Chowan by appeal), where it was heard and determined by *Albertson, Judge*, Fall Term, 1873, upon the following case agreed:

"A verbal agreement was made in January, 1872, between defendant Wood and his intestate, Miller, that his intestate, Miller, should cultivate his farm for that year. Defendant was to furnish the team; Miller to furnish labor and cultivate and house the crop and deliver to defendant two-thirds of the crop made. It was agreed that Wood should advance money to pay for labor and that the crop should be bound for such advances.

"In September of that year the intestate conveyed to plaintiff his interest in the growing crop on defendant's land to secure a debt of $75, which conveyance was duly registered. Intestate died the last of September, 1872, before any part of the crop was gathered, and defendant administered on his estate and had the crop gathered and sold.

"During the year, and before the execution of the trust to the plaintiff, the defendant, Wood, paid in money for labor employed in making the crop the sum of $. ., and expended in gathering his intestate's part of the crop the further sum of $. .. As soon as the crop was gathered and prepared for market the defendant, Wood, caused his claim for advances to be filed as a lien in the proper office. The intestate's part of the crop sold for $... The defendant expended money in securing the crop after the death of the intestate.

"It was agreed that this latter sum was to be repaid to the defendant before the plaintiff's claim. It was also agreed that if his Honor was of opinion that if the lien on the crop filed by defendant for money paid for labor prevailed over the claim of the plaintiff, then judgment should be entered for $..; but if his Honor was of opinion that the defendant, Wood, had no lien on the crop for those payments, then plaintiff was to have judgment for his full demand, $..."

Upon consideration, his Honor, being of opinion with the plaintiff, gave judgment for his full demand, (127) from which judgment defendant appealed.

No counsel in this Court for appellant.

A. M. Moore, for plaintiff, submitted:

That the judgment of the Court is correct.

1. The intestate conveyed his interest in the crop to plaintiff, the conveyance was recorded during his life and has precedence over the account filed by defendant.

To create a lien for advances for agricultural purposes, chapter 1, Laws 1866-'67, must be strictly followed.

2. The debt for which defendant claims preference was one due by intestate to Wood & Hathaway. It was charged to defendant, and evidence by Hathaway to establish it was incompetent.

RODMAN, J. It appears from the case agreed that the whole object of this action is to determine the priority between the liens of the plaintiff and defendant, respectively, upon the crop raised by Miller. But for that agreement the question would not arise at all in the present case. The warrant claims a debt of $100 alleged to be owing to the plaintiff by Miller, and as it is admitted that Miller did owe the plaintiff $75, the plaintiff would be entitled to judgment against the defendant as administrator of Miller for that sum. No question of lien would arise, nor would the judgment fix the defendant with assets. Its whole effect would be to ascertain the debt. Disregarding, however, the irregular way in which the question is presented, we proceed to consider the question upon which the parties desire our judgment to be given.

The facts are these: Wood owned a farm. In January, 1872, it was verbally agreed between him and Miller that Miller should cultivate the farm for that year, Wood furnishing the team and Miller doing or furnishing the labor. The crop when gathered was to be divided, Wood receiving two-thirds and Miller one-third.

(128) The case further says: "It was agreed that Wood should advance money to pay for labor, and that the crop should be bound for such advance." This agreement, it will be noticed, was not in writing, and of course was not registered. Assuming that in the absence of any statute avoiding it, the agreement would have had the effect to convey to Wood the interest of Miller in the expected crop as a security for the advances which Wood was to make, it is clear that it is avoided as against creditors and purchasers for a valuable consideration from Miller, by Rev. Code, chap. 37, sec. 22. Neither is it *directly* made good by anything in the acts concerning liens of laborers and material men. The acts in existence at the date of the agreement between Miller and Wood (January, 1872) were the Acts of 1869-'70, chap. 206, and of 1866-'67, chap. 1, as qualified by that act. The act of 1 March, 1873 (Acts 1872-'73, chap. 133), re-enacting the Act of 1866-'67, had then no existence. If the claim of Wood was that upon the parol agreement of January he advanced money to Miller upon the security of the expected crop, he would have no lien, because the agreement was not in writing, as it is required to be, not only by Revised Code as cited, but by the Act of 1866-'67. The lien of the plaintiff, which was good between the parties to the contract, viz., himself and Miller, would thus be the only lien.

The case, however, is that Wood paid laborers on the farm to a sum which is left blank in the case agreed, before the plaintiff received the assignment from Miller under which he claims. It is contended for the defendant that the laborers had a lien, which by the payment of their claims by Wood passed in equity to him, and which, as against the plaintiff, was not lost by Wood's omission to file notices with the proper officer according to the Act of 1869-'70.

We hold that the laborers had an inchoate lien preferable to that of the plaintiff, which might have been perfected by filing notice, and would have related back to the commencement of their work. *Warren v. Woodard, post,* 382. But in that case it must be noticed that the plaintiff made his advances while the defendant was doing work, and (129) before the right to perfect the lien was lost. Whether the laborers whom Wood paid were in a like condition the case does not state. As no point was made upon that, we assume that they were. Then we consider that their rights of lien passed to Wood upon the payments without an express assignment. Wood was substantially a surety for Miller to these claims. Although his contract with Miller was that his advancements should be a lien on Miller's share of the crop, yet his agreement to make the advances was binding on him, and Miller might have recovered in case of a failure. Again, his share of the crop was equally liable with Miller's for the pay of the laborers, for which Miller was primarily bound. Under these circumstances he was, by force of the contract, bound to pay Miller's debt. The law is that if a surety pays a bond of his principal, for which there is no collateral security, the bond is thereby extinguished, unless he takes an assignment to a trustee. *Sherwood v. Collier,* 14 N. C., 380. But in equity it is held that if the creditor has taken a collateral security for the debt, the surety, on payment, is subrogated to the rights of the creditor in the security without an express assignment. *Smith v. McLeod,* 38 N. C., 390. In the present case, therefore, Wood is an equitable assignee of the rights to lien of the laborers. The only remaining question is whether the lien thus acquired was lost by an omission to file a notice within the time required by the Act of 1869-'70.

We may admit that it would have been as against a person acquiring a right after the expiration of the prescribed time. But here the plaintiff acquired his right while the work was going on. A notice filed within thirty days after the termination of the work, which would clearly have perfected the lien of the laborers against him, would not have availed him, and the omission of it, therefore, cannot concern him. The law requires that those who advance money or supplies after a work is begun, and within thirty days after its termination, shall inform themselves as they best may of prior inchoate liens.

(130) Judgment below reversed, and judgment for defendant according to the case agreed.

PER CURIAM. Judgment reversed.

Cited: Liles v. Rogers, 113 N. C., 200.

HANSON MALPASS v. TOD R. CALDWELL, Governor, etc.

A person applying for and receiving from a sheriff a warrant and special deputation to arrest a fugitive from justice, and who executes the warrant and delivers to the sheriff the person arrested, is not entitled to the reward offered by the Governor for the apprehension of such fugitive.

CLAIM against the State, upon the following facts agreed: In September, 1873, his Excellency the Governor issued his proclamation offering a reward of three hundred dollars for the arrest of one Frank Malpass, a fugitive from justice, charged with murder; the reward to be paid to any person who should apprehend said Frank Malpass and deliver him to the sheriff of New Hanover County. In October following the plaintiff did deliver the said fugitive to the sheriff of New Hanover, who committed him to jail by virtue of process in his hands. About one week before the apprehension and delivery of said fugitive the plaintiff applied to the sheriff of New Hanover for a warrant, special deputation, or other authority, to enable him to make the arrest. The sheriff delivered to the plaintiff the process in his hands against the fugitive and specially deputized him to execute it. This process plaintiff returned to the sheriff when he produced the body of the fugitive. The sheriff does not nor ever did claim the reward, or any part thereof, offered by his Excellency. The plaintiff was not, is not now, nor ever has been a regular deputy of the sheriff, and was not at the time of making the arrest holding any office under the State.

(131) The Governor refuses to pay the reward to the plaintiff, upon the ground that he acted as the agent or deputy of the sheriff, and is not entiled thereto, for the reason that it is the duty of sheriffs and other peace officers to arrest,

without reward, all felons when in their power to do so; and if the sheriff be not entitled to the reward himself, in case he had made the arrest, his deputy, either general or appointed for the special purpose of making it, is not entitled to receive it, under the maxim, *"qui facit per alium, facit per se."* The State is not expected to arrest a criminal through and by virtue of judicial process and through an officer regularly deputed to make the arrest and then pay the officer a reward for discharging a duty he was bound to discharge, if in his power. All the officer can claim is his regular lawful fees for executing the process.

If the Court be of opinion, upon the foregoing state of facts, that the claimant is entitled to the reward, the Governor will issue his warrant for the same on the public treasurer.

Argo, for the claimant.
Hargrove, Attorney-General, contra.

PEARSON, C. J. This action follows *Cotton v. Ellis,* 52 N. C., 545, where the Court allowed an application for a *mandamus* on the ground that otherwise there might be "a wrong without a remedy." We adopt that case as a precedent, and after hearing the matter fully discussed by counsel learned in the law, and giving to it clear consideration, we declare our opinion to be that the Governor is under no obligation and is not authorized by law, upon the facts set out on the record, to issue his warrant for the payment of the reward which is claimed by this action.

The purpose of the statute and of the proclamation made in pursuance thereof is to enlist the active exertions of persons (who are under no positive obligation to do so) to apprehend and deliver to the proper authorities fugi- (132) tives from justice, to the end that they may be made amenable to the law.

It is a well-settled principle of law: "Statutes are to be construed in reference to the purpose for which they are enacted, and although a case may come within the words, the statute does not apply if the case does not also come within the meaning thereof to be judged of by a consideration of the purpose for which it was enacted."

A familiar illustration is that of a statute making it a crime to draw blood in the streets of a city. A man walking in the streets falls in a fit; a surgeon, being instantly called, bleeds the man. The case comes within the letter, but not within the meaning.

Our conclusion that the present case does not come within the present meaning of the statute is based upon the following considerations:

1. Suppose "a fugitive," after the proclamation, of his own accord, surrenders himself to the proper authorities, can he claim the reward? Certainly not. Why? Not on the technical ground that he could not "apprehend himself," for the apprehension is a mere incident, and the delivery to the sheriff is the substance of the thing; but upon the broad ground, "no man shall take advantage of his own wrong." Fleeing from justice when charged with the commission of a crime is a breach of allegiance to his sovereign; it was his duty to surrender himself to the proper authorities, and he cannot claim a reward for doing so, inasmuch as his wrongful act made it necessary to offer the reward.

2. Suppose a sheriff, having a warrant in his hands by which he is commanded to arrest a person charged with the commission of a crime, neglects to execute the warrant; afterwards the Governor offers a reward and the sheriff then arrests the party; is the sheriff entitled to the reward? Certainly not. Why? Because the warrant imposed upon him a positive duty to make the arrest, and when he executes the warrant he merely discharges his duty and thereby saves (133) himself from punishment upon an indictment for misdemeanor in office. And to allow him to claim the reward which his own negligence made it necessary for the Governor to offer would not only violate the maxim "no man shall take advantage of his own wrong," but would defeat the policy of the statute, which is to *call in volunteers* by the offer of a bounty, and not to relieve the officers of the law from the discharge of their sworn duty.

3. We now come to our case. The plaintiff applies to the sheriff for a warrant and special deputation to arrest "the fugitive." Thereupon the sheriff hands to the plaintiff the process by which the sheriff is commanded to make the arrest, and specially deputizes the plaintiff to execute the process, which he returns to the sheriff together with the body of the

fugitive. Under this state of facts, is the plaintiff entitled to the reward?

On the one side it is said if the sheriff had executed the warrant he would not have been entitled to the reward, consequently his deputy is not entitled to it. *Reply:* Had the arrest been made by a regular deputy of the sheriff, it may be such deputy could not have occupied higher ground than the sheriff himself; but the plaintiff was a volunteer, who was induced to tender his services by reason of the reward which was offered. Had he apprehended and delivered "the fugitive" to the sheriff without getting the warrant and deputation his claim to the reward would not have been questioned, and the circumstance of his getting the warrant and deputation cannot in any way affect the merits of his claim, for the object was to have "the fugitive" delivered to the sheriff—which was done—and it makes no difference whether it be done in the one way or the other. *Rejoinder:* It does make a very material difference; for, by taking the warrant and executing it *as the deputy of the sheriff*, it is put in his power to return the warrant "executed," and thereby protect himself from an indictment for misdemeanor in office for his neglect in failing to apprehend "the fugitive," who was lurking in his county, charged with a capital felony.

Our conclusion is that as the plaintiff, by undertaking to act for and in the name of the sheriff, relieved him from his official liability, the legal consequences fixes a character upon the transaction which cannot be changed; and the plaintiff is, by reason thereof, concluded from answering that, in truth, he was not acting as the deputy of the sheriff. (134)

Judgment. Let the proceeding be dismissed at the cost of the plaintiff.

PER CURIAM. Judgment accordingly.

WILLIAM A. BARTON *Ex-parte.*

In a petition for *certiorari,* as a writ of false judgment, it must be affirmed or shown that a judgment was rendered; if the *certiorari* is applied for as a substitute for an appeal the party must show that he has been improperly deprived of his appeal or has lost it by accident.

(Cases of *Dougan v. Arnold,* 15 N. C., 99; *McMillan v. Smith,* 4 N. C., 173; *Collins v. Nall,* 14 N. C., 224, cited and approved).

PETITION for a writ of *certiorari,* heard by *Tourgee, Judge,* at chambers, 14 December, 1873.

It is stated in the petition that in December, 1873, one Chesley L. Barton, on behalf of Thomas Barton, filed in the Probate Court of Person County a petition *in forma pauperis,* praying for a jury who should try and say whether the said Thomas was or was not *non compos mentis* and capable of managing his own affairs; that the jury was summoned as prayed for, and met at the court-house on 20 April, 1872, and, after hearing evidence, for their verdict found "that the said Thomas Barton was incapable of managing his own business in a judicious and proper manner." That no order was issued, nor any guardian appointed for the said Thomas according to the verdict.

(135) Further, it is stated in the petition that the plaintiff, or petitioner in this case, after the verdict of the jury, applied to the Judge of Probate to reopen the case, upon the ground that all the evidence in relation to the state of Thomas Barton's mind was not produced before the jury; that he, the present petitioner, did not make himself a party to the proceedings, but only acted as a friend of the said Thomas Barton, and, with the consent of the petitioner in the original cause, the matter was reheard before another jury in May, 1873, who, for their verdict, found "that no guardian is necessary," thus reversing the decision of the first jury; and that the Probate Judge has issued an execution against the petitioner in this case for about sixty dollars' costs.

For the foregoing reasons it is prayed that a writ of *certiorari* issue to the Judge of Probate, commanding to certify the proceedings in the original petition of Chesley L. Barton to the Superior Court of Person County, and cause the case to be docketed; and in the meantime that a special injunction issue to the sheriff, commanding him to refrain from any further proceedings under the execution for costs.

Upon the hearing his Honor ordered the petition to be dismissed and the petitioner to pay costs, from which order the petitioner appealed.

Jones & Jones, for petitioner.

When an appeal is not given by law, a *certiorari* is the proper remedy. *Reardon v. Guy,* 3 N. C., 433; *Davis v. Marshall,* 9 N. C., 59. The petitioner in this case could not appeal, because he was not a party; the appeal being denied, his only remedy was by a writ of *certiorari.*

There is merit in the petition, the petitioner has inherent rights, and the writ should have been granted, so that he could be heard. *Ex-parte Schenck,* 65 N. C., 353.

The first petition was brought *in forma pauperis,* and if this petitioner was a party, then no costs could have been taxed against him. He was not a party, and of (136) course, under no circumstances, could an execution for costs issue against him.

BYNUM, J. The writ of *certiorari* lies to correct errors of law, as a writ of false judgment or as a substitute for an appeal, and issues when the party has been improperly deprived of his appeal, as a matter of course, and where he has lost his appeal by accident; it issues upon affidavit and showing *prima facie* a case of merits. *Dougan v. Arnold,* 15 N. C., 99.

In our case a *certiorari* cannot issue as a writ of false *judgment,* for it is not affirmed or shown in the petition that any judgment at all was rendered against the petitioner. A judgment is the foundation of the writ in this aspect of the case.

If, however, the writ is applied for as a substitute for an appeal, to entitle him to it the party must show that he has been improperly deprived of his appeal or has lost it by accident. The case does not show that an appeal was prayed even, much less that he was deprived of it by accident or otherwise; nor does the case show any merits which entitled him to relief in the Superior Court. *McMillan v. Smith*, 4 N. C., 173; *Collins v. Nall,* 14 N. C., 224.

The case shows that an inquest of lunacy had been held upon one Thomas Barton at the instance of C. L. Barton, and that the Judge of Probate of Person County, before whom it was held, had issued an execution against the plaintiff here for the costs.

He has mistaken his remedy, which was by a motion in the cause in the court which had jurisdiction of the proceedings in lunacy and which had issued the execution.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Williams v. Williams, 71 N. C., 430.

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W. A. STEELE v. COMMISSIONERS OF RUTHERFORD.

The Acts of 1870-'71, chap. 42, secs. 1 and 2 (Bat. Rev., chap. 18, secs. 1 and 2) and of 1871-'72, chap. 45, do not change the *venue* of any action; and therefore actions against a Board of County Commissioners must be brought in the county of such Commissioners.

RODMAN, J., *dissentiente.*

(*Jones v. Com.*, 69 N. C., 412, cited and approved).

CIVIL ACTION for the recovery of certain interest, tried on demurrer by *Moore, Judge,* July (Special) Term, 1873, Superior Court of MECKLENBURG.

Plaintiff sued defendants, who compose the Board of Commissioners of Rutherford County, to the Superior Court of Mecklenburg County, in which he (the plaintiff) resided.

Defendants demurred, alleging as a cause that the action should have been brought in the county of which defendants were officers, to-wit, Rutherford.

His Honor sustained the demurrer, dismissing the action, and gave judgment against the plaintiff for costs, from which judgment he appealed.

J. H. Wilson, for appellant.

Carson and *J. C. L. Harris, contra,* submitted:

I. Court did not have jurisdiction, section 67, C. C. P.: "Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the Court to change the place of trial, in the cases provided in this Code."

1. For recovery of penalty, etc.

2. Against a public officer or person especially appointed to execute his duties for an act done by him by virtue of his office; or against a person who by his command or in his aid shall do anything touching the duties of such officers. *Jones v. Comrs.*, 67 N. C., 101; *Alexander v. Comrs.*, 67 N. C., 330; *Jones v. Comrs.*, 69 N. C., 412. (138)

II. Demand must be made on the proper officer of the county and refused, and defendants must have notice of such demand and refusal. *Love v. Comrs.*, 64 N. C., 606; *Alexander v. Comrs.*, 67 N. C., 330.

READE, J. The question is as to the proper *venue* of the action. In *Jones v. Comrs.*, 69 N. C., 412, it was held "That suits against county commissioners ought to be brought in the county in which they are commissioners." And that case was supported by two other cases therein cited. The case was well considered, as will appear by the fact that the Court were divided. And the case was also well argued, as will appear by the brief of the plaintiff's counsel, who argued against the conclusion to which the Court arrived. As that is the only point in this case, it would probably have been considered as settled but for the fact that the decision was put upon C. C. P., sec. 67; and it is supposed that there are two subsequent statutes which have changed section 67, C. C. P., and which were not called to the attention of the Court on the argument nor cited in either of the opinions. Out of respect for the learned counsel who argued this case, we consider the point anew and with reference to the subsequent statutes.

C. C. P., sec. 67, upon which the decision in *Jones v. Comrs., supra*, was founded, provides that "actions for the following causes must be tried in the county where the cause or some part thereof arose; * * * against a public officer; * * * for an act done by him in virtue of his office," etc. From this we inferred that public officers must be sued in their own counties.

The dissenting opinion of our learned brother *Rodman* was based upon the first clause above, and upon his conclusion that the *proximate* cause of action was the failure of the (139) commissioners of Bladen to seek their creditor, who lived in Cumberland County, to which the suit was brought, and pay him his debt. We did not think that the failure to pay the debt was the cause of action spoken of in the statute, but that the debt itself was the cause of action; and that the expression "where the cause of action *arose*" meant where the debt was contracted or originated. And that view is strengthened by the second clause above, "against a public officer * * * for an act done by him by virtue of his office." Now, as an officer's official acts are confined to his county, and as the cause of action is his official act, it follows that the cause of action spoken of "*arose*" in the county in which the commissioners acted, and not out of their county, where they did nothing "by virtue of his office." It seemed to us to be the policy to require that all public officers, when sued about their official acts, should be sued in the county where they transact their official business. And the same policy is extended to executors, administrators and guardians, where they are sued. *Stanly v. Mason,* 69 N. C., 1.

We will now examine the subsequent legislation. It is provided in The Code that all civil actions shall be returnable before the Clerk of the Superior Court *in vacation,* and a speedy remedy was provided to obtain judgment. The Legislature determined to alter that and require them to be returned *in term time* and to delay the final judgment. To do that they passed an act "to suspend the Code of Civil Procedure," and in which it is provided that "all civil actions shall be returnable in term time." "It shall be returnable to the regular term of the Superior Court of the county where the plaintiff or the defendant resides."

Now it is apparent to us that it is no part of the purpose of this act to alter the special provision which had been made in regard to suing public officers. The main object, as has been said, was to change the return from the Clerk in vacation to the Judge in term time, and if any alteration of the (140) *venue* of actions was intended, it was only in regard to actions generally and not the exceptional action against public officers.

But it is apparent that the act aforesaid did not intend to change, and does not change, the *venue* of any action. It provides that the summons shall be returnable to the Superior Court in term time, and not before the Clerk in vacation. "It shall be returnable to the regular term of the Superior Court of the county." What county? Why, of the county "where the plaintiff or the defendant resides." Observe that it is not returnable to the county where the plaintiff resides, nor yet to the county where the defendant resides, but to either. Just as if it had said it must be returnable in term time and not in vacation; but as to the county, whether of the plaintiff or the defendant, must remain as it now is. Acts 1870-'71, chap. 42, secs. 1 and 2; Bat. Rev., chap. 18, secs. 1 and 2.

And so in 1871-'72 an act was passed which provides that in "applications for *mandamus* when the plaintiff seeks to enforce a money demand, the summons shall issue and be made returnable as in the foregoing act." How returnable? Evidently in term time and not in vacation. That is all that is meant, as is evident from what immediately follows: In all other applications for *mandamus* the summons shall be returnable at chambers. Bat. Rev., chap. 17, sec. 381.

The foregoing are the statutes which were cited and relied on as changing the *venue* of actions against public officers. We do not think they change the *venue* of *any* actions. But if any, then only actions generally and not those which are exceptional.

There is no error.

PER CURIAM. Judgment affirmed.

BYNUM, J., did not sit.

Cited: Comrs. v. Comrs, post, 657; *Cloman v. Staton,* 78 N. C., 236; *Jones v. Statesville,* 97 N. C., 88; *Rogers v. Jenkins,* 98 N. C., 131; *Watson v. Mitchell,* 108 N. C., 364.

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JOHN THOMPSON v. MARY G. BADHAM, administratrix, etc.

1. A privity exists between an administrator *de bonis non* and the first administrator, as well in the case of plaintiff as of defendants, so that the former succeeds to all the rights of the intestate in respect to personal property which the first had not fully administered; and a judgment against the first administrator is conclusive evidence against the administrator *de bonis non* in an action to renew it.
2. Such judgment may, however, be impeached for fraud by the administrator *de bonis non,* either by motion in the cause or by answer to plaintiff's action to revive it.

(The cases of *Ellison v. Andrews,* 34 N. C., 190; *Jarman v. Sanders,* 64 N. C., 367; *Ferebee v. Barter,* 34 N. C., 64; *Cannon v. Jenkins,* 16 N. C., 422; *Butner v. Keehln,* 51 N. C., 60; *Eure v. Eure,* 14 N. C., 206; *Smith v. Downey,* 38 N. C., 286, cited, commented on and approved).

CIVIL ACTION, commenced in a justice's court, from which the transcript of the judgment in favor of the plaintiff was filed in the Superior Court of CHOWAN County, where a motion in the cause was heard by *Albertson, Judge,* Fall Term, 1873.

The facts are: William Badham died intestate, a citizen of Chowan County, in 1863, and administration on his estate was granted to the defendant, Mary G. Badham, in 1865, who administered the estate from the time of her qualification to the time of her death, in 1871.

In 1871 plaintiff obtained in a justice's court a judgment against Mary G. Badham, the administratrix, for about $103, and filed a transcript of the same in the Superior Court of Chowan County. In the fall of 1871 the administratrix died, and administration *de bonis non* on the estate of William Badham was granted to the present defendant, Fanny R. Warren, one of the next of kin of her intestate, who is now discharging the duties of the office.

The plaintiff issued a notice to the present administratrix, returnable to Fall Term, 1873, of said Court, to show cause why judgment should not be entered up against her as administratrix *de bonis non,* and execution issue thereon. On the hearing of this motion the administratrix offered to
(142) show:

1. That the plaintiff in 1861 was and still is in-

debted to the estate of her intestate, William Badham, in amount several thousand dollars; that the account upon which the plaintiff obtained his judgment was contracted by the former administratrix, Mary G. Badham, in 1867, several years after the death of her intestate: that the plaintiff filed his petition in bankruptcy in 1869, and purchased this account from his assignee; that the debt due from the plaintiff to her intestate was duly proved before and acknowledged by the assignee of the plaintiff, and therefore the judgment rendered before the justice and on which this action is founded against the said Mary G. Badham was a fraud on the next of kin.

2. That the account on which the judgment was rendered was for lumber purchased by Mary G. Badham, in 1867, and was therefore her individual debt; and that said judgment was a frand upon the estate of her intestate.

His Honor refused to hear the testimony because he had not the power, and because the present administratrix *de bonis non* was concluded by the judgment rendered against the first administratrix, Mary G. Badham, and is estopped from any defense which might have been made by said Mary G. Badham; and thereupon his Honor gave judgment in favor of the plaintiff against the present administratrix *de bonis non*, from which judgment she (the defendant) appealed.

A. M. Moore, for appellant.
No counsel in this Court, *contra*.

RODMAN, J. Three questions are presented in this case:

1. Can a plaintiff who has recovered judgment against an administrator revive or enforce the judgment after the death of the administrator against an administrator *de bonis non?*

At common law there was no privity between an administrator and an administrator *de bonis non*. *Ellison v. Andrews*, 34 N. C., 190. If an administrator recovered a judgment and died before collecting it, it became ineffectual. The administrator *de bonis non* could not sue on (143) it, or avail himself of it in any way, though he might sue on the original cause of action. *Grant v. Chamberlain*, 4 Mass., 611; *Beall v. New Mexico*, 16 Wall., 543.

The inconvenience has been remedied by legislation more or less fully in England, and probabbly in most of the American States. In this State the Revised Code, chap. 1, sec. 4, enacts that no action to which an executor or administrator is plaintiff or *defendant* shall abate by his death, but it may be revived against the administrator *de bonis non,* etc. See also, C. C. P., sec. 64, and Rev. Code, chap. 46, sec. 43.

Under these or similar acts it has been settled in this State that a privity does exist between an administrator and an administrator *de bonis non* for many if not for all purposes.

The latter succeeds to all the rights of the intestate in respect to personal property which the administrator has not fully administered. He alone, to the exclusion of creditors and distributees, can recover from the representative of a deceased administrator not only the property remaining in specie (which is the general law), but also the value of the assets which the administrator has wasted or misapplied. *Ferebee v. Baxter,* 34 N. C., 64; *Cannon v. Jenkins,* 16 N. C., 422, and numerous other cases to the same effect. The acts cited seem especially to apply to cases in which the death of a representative party occurs before a final judgment or decree. But it is held in England upon the equity of a statute similar to ours, except that it is confined to plaintiffs, that an administrator *de bonis non* may revive a decree obtained by an administrator. *Pew v. Cudmore,* 3, chap. 33. See also *Butner v. Keelhn,* 51 N. C., 60. And the privity is held to exist in this State, so that an administrator *de bonis non* can recover upon a bond taken payable to the administrator. *Eure v. Eure,* 14 N. C., 206.

It is a reasonable inference that if the act cited makes successive personal representatives privies when they are plaintiffs, it does so also when they are defendants. If an administrator *de bonis non* can enforce a judgment recovered (144) by an administrator, as by *Eure v. Eure* and *Pew v. Cudmore* he can, is there any reason why a judgment against an administrator shall not be evidence (whether conclusive or otherwise) against the administrator *de bonis non?* The only difficulty in the answer, we conceive, consists in this: that there is no direct authority that we know of to the effect that it is, and there is respectable authority apparently to the contrary.

In Bigelow Estoppels, 79, it is said: "An administrator *de* *bonis non* is not in privity with the (first) representative of a deceased testator; and therefore a judgment against the former is no evidence of debt against the latter. Nor is an administrator *de bonis non* in privity with his predecessor the executor."

The authorities cited for this, *Thomas v. Stearns,* 33 Ala., 137, and *Coleman v. McMurdo,* 5 Rand., 91, are not accessible to us. Probably they depend upon the statutes of the particular States. At all events, being on a matter of local and statutory law, we do not consider them binding on us.

We think there is such a privity created by statute between an administrator and an administrator *de bonis non* as makes a judgment against the former *evidence* against the latter.

2. Is the evidence *prima facie* only or conclusive? The answer is not altogether free from difficulty. Some inconvenience may attend a general rule either way. If the judgment be held only *prima facie* evidence, the defendant may dispute the items of an account or the *factum* of a bond, and put the plaintiff to proof of them a second time after the matters have been once decided by a competent Court, after a careful and faithful defense by the administrator. If held conclusive in the absence of fraud, it may sometimes happen that by the ignorance or inadvertence of an administrator the personal estate will be held bound for a debt to which a good defense is subsequently discovered. There is also an entire want of direct authority as far as we know. On the whole, we think that the inconvenience and chance of wrong is less by holding the judgment conclusive, and that both principle and the authorities which have been found are that way.

The same reason which makes the judgment evidence at all makes it conclusive, for privies are concluded where the parties to whom they are in privity are. To hold it less than conclusive would be to deny all effect to the privity.

Confessedly there is no privity between the administrator and the heir. But it is held that a judgment against the administrator is *prima facie* evidence against the heir. *Alston v. Mumford,* 1 Brock. C. C., 266; *Harvey v. Wilde,* L. R., 14 Eq., 438. And in *Steele v. Lineberger,* 59 Pa., 308, it is said that such a judgment is conclusive as to the personalty, and *prima facie* evidence against the heir. In *Smith v. Downey,* 3 Ired., 268, a residuary legatee sought to falsify an item in the account of the defendant, who was administrator *cum test. annex.*, by which he claimed credit as having paid a judgment recovered against him by a creditor of the testator, on the ground that the judgment was fraudulent and collusive. The defendant denied the fraud, and also relied on the judgment as an estoppel as to the existence of the debt. *Ruffin, Circuit Judge*, says: "Certainly an administrator who honestly defended a suit is to be protected by the judgment obtained against him *per testes* and *in invito*, although the claim on which the judgment was founded may have been unjust."

3. Can the judgment be impeached by the administrator *de bonis non* for fraud between the plaintiff and the administrator in obtaining it?

Judgments are not exempt from the general principle that all transactions may be avoided for fraud. *Story*, in enumerating the cases in which Courts of Equity will give relief, mentions cases "of fraud in verdicts, judgments, decrees, and other judicial proceedings." Story Eq. Jur., sec. 252; *Earl of Brandon v. Beecher*, 3 Cl. & Fin. H. L., 479. The case of *Smith v. Downey*, 38 N. C., 286, is to the same effect. In the present case both administrators were trustees for the next of kin, and although the statute creates a privity between them for certain purposes of convenience, it does not (146) extend to protect any fraud.

The rule that parties and privies cannot *collaterally* impeach a judgment has no application. Formerly relief was generally to be sought by bill in equity. In *Jarman v. Saunders*, 64 N. C., 367, it was held that it should be done by a motion in the cause. There is no reason why it shall not be done upon an answer to the plaintiff's action to revive his judgment.

In all these ways the impeachment is direct, and the question of fraud is directly presented.

Judgment reversed, and case remanded to be proceeded in according to this opinion.

PER CURIAM. Judgment reversed.

Cited: Mabry v. Henry, 83 N. C., 300; *Grant v. Reese*, 94 N. C., 724.

BENAJIAH TAYLOR and wife, MARY, v. CHRISTOPHER J. DUDLEY and others.

In an action brought to subject certain lands (purchased by defendant) to the operation of an alleged verbal trust, to set up which it is material that all of certain parties contributed to the payment of the debt charged upon the land, evidence tending to show that one of such parties paid nothing towards said debt and claimed no interest in the land is material and admissible, and that his Honor erred in excluding it on the trial below.

CIVIL ACTION, tried at Special (January) Term, 1873, Superior Court of CRAVEN, before *Watts, Judge.*

The facts of the case are fully set out in the opinion of the Chief Justice. Upon the trial in the Court below, his Honor delivered the following judgment:

"The Court doth declare, that on the — day of ——, a deed of mortgage was executed by Spicer Lane and wife, Ada, to one Bishop E. Dudley, conveying the (147) lands, with others in controversy, to secure the said Dudley as surety for the said Spicer on a note for $1,050, due one John T. Lane.

"That thereafter, to-wit, on 21 October, 1849, the said Spicer Lane and wife, Ada, and Bishop E. Dudley jointly executed a deed to one Thompson G. Lane, the eldest son of the said Spicer and Ada, for all the lands covered by the previous mortgage, reciting the fact of the existence of such deed of mortgage, and that it had been agreed between the parties to adjust and settle said note due John T. Lane, then reduced to $950; that it appears from said deed to Thompson G. Lane, and the evidence on the trial, that the said deed was executed by the parties as a security for the payment of the John T. Lane note.

"That there was an agreement between Thompson G. Lane and his father, Spicer, and his mother, Ada, the owner of the land when the said deed, 21 October, 1849, was executed to Thompson G. Lane as a consideration and main inducement for making said deed, that the other children of Spicer Lane should all aid in paying off the said Lane debt, and that when said debt was paid the lands should be held and owned by all the said children as their common home and property; that the said debt to Lane was paid off in the spring of 1855; that the plaintiff, Mary Taylor, one of the daughters of said Spicer, contributed her part towards the payment of said note; and that on 21 August, 1858, the said Thompson G. Lane executed a deed of bargain and sale for $2,300 for the land in controversy, and that the same was a full price. That it further appears that the defendant purchased with notice of the trust attaching to the said land in controversy.

"The Court doth further declare that the foregoing facts appeared on trial and were so found by the jury.

"The judgment of the Court is therefore this:

"1. That the defendant is a trustee for the plaintiff of said land covered by his deed of 21 August, 1858.

(148) "2. That he convey to the plaintiff, Mary Taylor, one-half of said land in fee by a deed subject to the approval of this Court.

"3. That the Clerk ascertain the value of the rents and profits for the use of said land from 1 January, 1859, to the time of taking said account.

"4. That the defendant do pay to the plaintiff, Mary, one-half of the amount so ascertained by the Clerk, for the rents and profits."

From this judgment, the defendants appealed to this Court.

Green, for appellants, cited and commented on *Brown et al. v. Carson's Executors,* 45 N. C., 172; *Clement v. Clement,* 54 N. C., 184; *Biggs v. Morris, Ibid.*, 193. As to competency of evidence, counsel cited *Reynolds v. Magness,* 24 N. C., 26; *Johnson v. Taylor,* 15 N. C., 355. A parol trust cannot arise unless there is an equity existing between the parties at the time the deed was made. *Blount v. Carroway,* 67 N. C.

Haughton, with whom was *Battle & Son,* for plaintiffs, submitted:

That the acts and declarations of a grantor *after* the conveyance are not to be received to impeach the grant. But his acts and declarations, before or after, characterizing his possession, are evidence. *Askew v. Reynolds,* 18 N. C., 370; *Hall v. Gully,* 3 Minn., 151; *McCanless v. Reynolds,* 67 N. C., 268. Also cited and relied on *Kemp v. Earp,* 42 N. C., 166; *Moore v. Joy,* 43 N. C., 197; *Blount v. Carroway,* 67 N. C., 400; 2 Story's Eq. Pl., sec. 1200, p. 443.

PEARSON, C. J. The object of the action is to follow the land sued for, and to subject it in the hands of defendant Dudley to a trust to which it is alleged a larger parcel of land of which this is a part was subject in the hands of Thompson Lane for the benefit of his brothers and sisters and himself to be equally divided among them; of which trust the defendant Dudley, as is alleged, had notice at the time (149) he took a conveyance of the part in controversey from said Thompson.

It is set out in the complaint that one Spicer Lane (who was the father of the plaintiff Mary) being indebted to one John Lane executed to them a note, with one Bishop Dudley as security, for the sum of $1,050, and to indemnify the said Bishop Dudley, Spicer Lane and his wife, Ada, executed to him a mortgage for the land of said Ada, containing about 1,180 acres; that Spicer Lane paid $100 on the debt, and afterwards it was agreed, as a family arrangement, that the said Spicer and his wife should convey their equity of redemption in the land to Thompson Lane, who was their eldest son, and should procure the said Bishop Dudley also to convey to the said Thompson the legal estate which he held as mortgagee, so as to vest the whole estate in him, subject to the charge of the balance of the debt for which said Bishop Dudley was security, which was to be discharged by the efforts of said Thompson and the other children, and he was to hold the land for the benefit of all as trustee.

This declaration of trust was not in writing, and the plaintiffs attempted to set it up by proof of parol admissions of said Thompson, and the facts and circumstances *dehors* these admissions.

4. "That in pursuance of said agreement and understanding, the other children of said Spicer and Ada, to-wit: the plaintiff, Mary, her sister Jane, and her brothers Daniel, Mason and Wiley, by their work and labor in teaching school and labor on said lands, contributed their full share and proportion in the payment of said debt; and they, with said Thompson, discharged the same, which was finally done on

the —— day of ——. The said Thompson only having paid his part, to-wit, one-sixth of the debt."

The complaint then alleges a joint possession by the members of the family, etc., and that Thompson had, in 1858, sold 460 acres of the land, in violation of the trust, to the defendant Dudley for $2,300; *that he had notice of the trust,* (150) and demands judgment for one-half of the 460 acres; her brothers, Mason and Wiley, having died intestate and without issue, and Daniel having conveyed for a valuable consideration all his interest in the entire body of land to the plaintiff Mary, whereby she is entitled to one-half; the children of her sister, Jane Wilcox, who are made defendants, to one-fourth, and the defendant, Dudley, and the heirs of Thompson Lane to the other fourth.

There is an omission in not making the heirs of Thompson Lane parties, the effect of which omission will be noticed in another view of the case.

On the trial the defendants offered to prove by Daniel Lane, a son of Spicer and Ada Lane, the facts and circumstances under which the deed from him to Mary Taylor was executed, that he received no consideration therefor. Defendants also offered to prove by Daniel Lane that he claimed no interest in the land, and that he had never contributed anything towards the payment of the mortgage debt. This evidence was objected to by the plaintiffs, and was excluded by the Court. Plaintiffs excepted.

On the argument the counsel of the plaintiffs stated this evidence was objected to and excluded on the ground that it was irrelevant and immaterial. It is true the deed from Daniel Lane to the plaintiff, Mary, was valid without a consideration, so in that point of view the evidence in respect to the fact whether there was or was not a consideration was immaterial and irrelevant; but it is relevant and has much significance in another point of view. The complaint alleges that all of the children, including Daniel, had contributed their full shares towards the discharge of the mortgage debt, and that Daniel had executed a deed to the plaintiff, Mary, for his share, for a valuable consideration; so this evidence was material and relevant, as directly contradicting a most material allegation of the complaint as a fact to aid the alleged verbal admissions of Thompson Lane in regard to the existence of a trust in favor of all of the children, to-wit, that they had contributed their shares to the discharge of the incumbrance on (151) the land. For it tended to show that Daniel, who was one of them, had contributed nothing, set up no claim to the land and had made his sister a deed of gift for any claim she could set up in his name.

For the exclusion of this evidence there must be a *venire de novo.*

This Court is always reluctant to set aside what has been done in the Court below and award a *venire de novo* upon a question of evidence without deciding the merits of the case; but in this instance we feel less reluctance than we otherwise would, for, although we incline to the opinion that there is no error in his Honor's charge in respect to the alleged trust, or his ruling that there was *some evidence* fit to be submitted to the jury on the question of notice to the defendant, Dudley, still, in considering the *judgment* entered by his Honor, we find we should have been under the necessity of remanding the case because the pleadings are defective. Material facts are not alleged or found, and the personal representative and the heirs of Thompson Lane, who is charged with a breach of trust, and through whom the plaintiff seeks to work out an equity to follow the land in the hands of the defendant, Dudley, are necessary parties. So it is manifest that no final judgment can be entered and the equities of the parties adjusted. For, supposing a trust to be established in favor of all the children of Spicer and Ada Lane, and supposing notice of this trust to be fixed on the defendant, Dudley, still a reference is necessary after all proper parties are before the Court in order to determine the rights of the parties. If the plaintiff, Mary, contributed her share towards discharging the incumbrance of the mortgage debt, then, as she claims to have succeeded to the share of Daniel Lane, she takes his share subject to a charge for his ratable contribution; so, in regard to Mason and Wiley, her two deceased brothers, under whom she claims as heir, she is to see that their ratable contributions have been paid and takes subject to this equity, and when "the assets are marshaled" the defendant, Dudley, a purchaser of a part of the land, has a clear equity to be (152) substituted to the rights of Thompson Lane, so as to put the burden upon the other part of the land, of which, in the judgment rendered, no notice is taken.

There is error.

This opinion will be certified, to the end that proper parties may be made, and if a trust is declared and notice is fixed on defendant Dudley that a reference may be made in order to enable the Court to adjust the equities of the parties.

PER CURIAM. *Venire de novo.*

THOMAS D. SEARS v. WILLOUGHBY McBRIDE.

To entitle a husband to an estate as tenant by the courtesy, before the adoption of the Rev. Code (1 January, 1856), a seizin in deed was necessary; and under the rules prescribed in chapter 38, Rev. Stat. (1 January, 1838), a seizin in deed was also necessary in case of the parent's claiming a life estate upon the death of his child. Now, under the provisions of the Rev. Code, chap. 38, rules 1 and 13, neither actual nor legal seizin is necessary to make the stock in the devolution of estates.

(*Lawrence v. Pitt,* 46 N. C., 344, cited and approved).

CIVIL ACTION for the recovery of a certain tract of land, submitted to and determined by *Albertson, Judge,* Fall Term, 1873, CURRITUCK Superior Court.

His Honor, upon the facts submitted, being of opinion with the defendant, the plaintiff appealed.

The facts are fully set out in the opinion of the Court.

No counsel in this Court for the appellant.

Smith & Strong, for the defendant.

(153) SETTLE, J. The facts presented by the record, and agreed upon by counsel, are as follows:

Daniel Lee died in 1823, in Currituck County, leaving a last will and testament, dated 22 November, 1822, in which he devised the use and benefit of certain land to his granddaughter, Eliza McPherson, until she arrived at the (154) age of eighteen, then for the land to return to his heirs, "and in case she should marry under the age of eighteen, or after then," he gave it to her and her heirs forever.

Eliza McPherson entered upon the premises, intermarried with one Israel Fanshaw, and died, leaving issue by him one daughter, named Eliza, who intermarried with the plaintiff, Thomas D. Sears, in 1850, and died 27 November, 1852, leaving issue by him one son, named William Sears. The said William Sears, son of the plaintiff by his wife Eliza, died 7 December, 1852, leaving no issue nor brother nor sister, nor the issue of such.

Israel Fanshaw, the husband of Eliza (born McPherson), survived his grandson, William Sears, and died in the fall of 1871, and he and those claiming under him remained in possession of the land claimed by plaintiff from his marriage with the said Eliza until his death.

The plaintiff claims:

1. The title in fee and the right to the possession of said land as the heir at law of his child, William Sears.

Failing in this, he claims:

2. That he is entitled to the possession of the land as tenant by the courtesy through his wife Eliza (born Fanshaw).

If neither of these points be with the plaintiff, then the title of the defendant is not disputed.

If this case were governed by the rules of descent to be found in the Revised Code, chap. 38, the plaintiff would be entitled to the land in controversy in fee-simple, but since it is governed by the rules as found in the Revised Statutes, chap. 38, he can take nothing. The learning on this subject is so fully and satisfactorily stated in *Lawrence v. Pitt,* 46 N. C., 344, that we shall not discuss the subject further than to apply the law to the facts before us.

1. The plaintiff cannot claim the land as tenant by the courtesy, for the reason that seizin in deed is necessary at common law to entitle the husband to courtesy, and here, since the actual seizin was in Israel Fanshaw as tenant by the courtesy until his death, in 1871, there never was at (155) any time seizin, either in law or in deed, in the wife of the plaintiff, who died in November, 1852, for the reason already given, to-wit, that the seizin was in Israel Fanshaw: there never was at any time seizin, either in law or in deed, in William Sears, who died in December, 1852, and therefore the plaintiff cannot claim even the life estate given in certain

cases to the parents or parent of the person last seized by the proviso to Rule 6 in the chapter on Descents in Rev. Stat.

But the law has been materially changed, as will be seen by reference to the Rev. Code, which enacts: "Rule 1. Every inheritance shall lineally descend forever to the issue of the person who died last seized, *entitled or having any interest therein*," etc. And further, as if to remove all doubt, Rule 13 is enacted, which declares: "Every person in whom a seizin is required by any of the provisions of this chapter shall be deemed to have been seized if he may have had any right, title or interest in the inheritance." So that now neither actual nor legal seizin is necessary to make the stock in the devolution of estates.

And it will be observed that while the proviso to Rule 6 in the Rev. Stat. gives, in certain contingencies, only a life estate to the parents, etc., yet in the Rev. Code, under the same contingencies, an estate in fee-simple is given to the father, if living, and if not, then to the mother, if living.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

(156)

H. J. CRAWFORD and others v. JOHN H. DALRYMPLE.

In 1831 and before, in order to subject land to the payment of debts, there was in the first place a judgment against the personal representative fixing the debt, and in the second place a *sci. fa.* setting out the judgment and calling upon the heirs to show cause why execution should not issue against the land which had descended. *Therefore,* a purchaser at a sheriff's sale under an execution unsupported by such judgment and *scire facias* obtains no title.

CIVIL ACTION, for the recovery of 210 acres of land, tried before *Buxton, Judge*, Fall Term, 1873, Superior Court of MOORE.

The plaintiffs claimed as children and heirs at law of William Crawford, who died seized and possessed of the premises in dispute in January, 1831.

Mr. Crawford left a widow, Catherine, to whom dower was allotted and which included the land sued for. She died in March, 1859.

The plaintiffs instituted an action of ejectment against the defendant on 28 January, 1861, which pended in the Superior Court of Moore until Spring Term, 1870, when a nonsuit was entered. This action was commenced soon thereafter, 5 August, 1879, by the plaintiffs, the admitted heirs at law of William Crawford. The defendant was in possession at that time and before, claiming both possession and title in fee.

It was conceded that the defendant had acquired the life interest of the widow by mesne conveyances from one Cook, to whom she sold it in 1831, executing a deed therefor. The defendant claims also to have acquired the reversionary interest of the heirs of William Crawford, to establish which he read in evidence a deed from Daniel Mitchell, sheriff of Moore County, to one Matthew G. Campbell, dated 25 August, 1832, conveying the land and containing the following recitals:

"This indenture, made this 23 August, in the year A. D. 1832, between Daniel McNeill, Esq., sheriff of Moore County, and State of North Carolina, on the one part, (157) and Matthew G. Campbell of the county of Moore and State of North Carolina, on the other part: Whereas, by virtue of execution issuing from the County Court of Moore for the sum of $23.78, recovered by Nancy McNair, and cost thereon, which said sum was against the heirs at law of William Crawford of Moore County, as on record of said Court may appear; and whereas, the said execution was directed and delivered to the said Daniel McNeill, Esq., sheriff as aforesaid, commanding him that of the goods and chattels, lands and tenements of the said heirs at law of the said William Crawford, he should cause to be made the aforesaid sum of $23.78 to satisfy said execution, with the costs thereon; and the said Daniel McNeill, Esq., sheriff as aforesaid, in pursuance and by virtue of his office and the aforesaid execution into his hand and custody (no goods or chattels to be found), did seize a certain piece or parcel of land situate, lying and being in the said county of Moore and bounded as follows, to-wit": (description as set forth in the complaint). "And the said Daniel McNeill, sheriff as aforesaid, after due advertisement according to law, did cause the said parcel of land, with the appurtenances thereto belonging, to be put up at public sale to the highest bidder at the court-house in Carthage, in Moore County, on the third Monday in February,

A. D. 1832, at which time and place Matthew G. Campbell became the last and highest bidder, at the sum of $21.75, for the said land and appurtenances thereto belonging. This indenture witnesseth that the said Daniel McNeill, sheriff of said county of Moore, for and in consideration," etc., conveyed the land to the purchaser, Campbell.

The defendant then read as evidence mesne conveyances from Matthew G. Campbell, the purchaser, down to himself, his own deed dated 12 October, 1836, followed by the possession of the land since 28 May, 1833.

Defendant insisted that the recital contained in the sheriff's deed, of the execution, levy and sale, was *prima facie* (158) evidence of those facts; that Campbell, not being the plaintiff in the execution, was not bound to show the judgment upon which the execution issued, neither was the defendant, who claimed under him; insisting that he had thus shown himself entitled not only to the dower interest of the widow, but also to reversionary interest of the heirs, the plaintiffs herein.

In answer to this defense the plaintiffs read as evidence the records of the County Court of Moore, relating to a certain suit, to-wit, *William Campbell v. Nancy McNair*, out of which the execution under which the land was sold issued. This record was produced to show that the proceedings in the case in the County Court were so defective and irregular as to be void, and therefore inadequate to support the title claimed by defendant.

The records showed that at August Term, 1830, an appeal entered from a justice's court in the case wherein William Crawford was plaintiff and Nancy McNair defendant, and that the defendant pleaded general issue, statute of limitations, pay and set-off; that at the November Term ensuing the case was continued; at February Term, 1831, the death of the plaintiff was suggested; at May Term, 1831, the suit abated; *fi. fa.* issued; on motion, Neill McNeill, Esq., is appointed guardian *ad litem* for the infant heirs at law of William Crawford, deceased. (After the abatement of the suit the Clerk taxed each party with their respective costs and issued execution). A *fi. fa.* against the goods and chattels of William Crawford, deceased, issued, returnable to the ensuing August Term, 1831.

Return endorsed by sheriff:

"No goods nor chattels found. Levied on 210 acres of land on both sides of," etc.

On 13 September, 1831, a *sci. fa.* issued to heirs of William Campbell to show cause why the said land should not be sold.

At November Term, 1831, the suit is docketed, *Nancy McNair v. The Heirs of William Campbell. Sci. fa.* made known. Judgment according to *sci. fa. Ven.* (159) *ex.* issued 7 December, 1831.

On the *ven. ex.* on file is a receipt of $12.29 from D. McNeill, sheriff, signed by D. McIver, attorney.

The plaintiffs having objected, among other things, that there was no return of a sale under the *ven. ex.*, and also insisting that as a matter of fact there was no sale made by the sheriff, the defendant, to corroborate the recital of a sale to Matthew G. Campbell, as contained in the sheriff's deed to him, offered to prove by one W. Bryan that he heard the said Campbell, while in possession of the land, claim to be the owner by purchase at an execution sale against the heirs of William Crawford. To this evidence the plaintiffs objected. Objection overruled, evidence admitted, and plaintiffs excepted.

Plaintiffs asked his Honor to charge the jury that even supposing there was a sale made by the sheriff, yet the whole proceedings were so radically defective as to be null and void, sale included, and consequently the title never passed from the plaintiffs, and that consequently they were entitled as the heirs of William Crawford to recover the land. These instructions the Court declined, and again plaintiff excepted.

The issue of sale or no sale being submitted to the jury, they found in favor of the defendant. Rule for a new trial; rule discharged; judgment, and appeal by the plaintiffs.

McDonald, for appellants.

Merrimon, Fuller & Ashe and *B. Fuller* and *N. McKay*, *contra*.

PEARSON, C. J. With every disposition to support the title of purchasers at sheriffs' sales and to relieve them from the effect of a mere non-observance of matters of detail by the officers of the law, we find ourselves unable to do so in this case, because it appears of record that there is no judgment to support the execution under which the sheriff sold the land; there could have been none, for there was no personal (160) representation of the deceased against whom a judgment could have been rendered.

According to the mode of procedure in 1831, in order to subject land to the payment of a debt, there was, in the first place, a judgment against the personal representative fixing the debt (the plea of "fully administered" being admitted, or found by the jury); and in the second place, a *sci. fa.* setting out the judgment and calling upon the heirs to show cause why execution should not issue against the land which had descended. This gives to the heirs a day in Court in order to make a "collateral issue" as to the due administration of the personal estate.

In our case there is "no personal representative," no judgment against him to fix the debt, no day in Court for the heirs to show why execution "*upon said judgment*" shall not issue to sell the real estate. But when the suit abated by reason of the death of William Crawford (the plaintiff) there issued a *fi. fa.* to make "his part of the costs of the goods and chattels," "levied on 210 acres of land"; then follows a *sci. fa.* against the heirs to show why the land should not be sold, and a *venditioni exponas*, under which the land is sold. These proceedings are not merely irregular, but void and of no effect, for the want of a judgment against the personal representative. So Campbell, under whom the defendant claims, had no title by power of the sheriff's sale.

There is error.

PER CURIAM. *Venire de novo.*

STATE on the relation of WILLIAM H. HOWERTON and others v. S. McD. TATE and others.

A person who is rightfully entitled to an office, although not in the actual possession thereof, has a property therein, and may maintain an action for money had and received against a mere intruder who may perform the duties of such office for a time and receive the fees arising therefrom; and such intruder cannot retain any part of the fees as a compensation for his labor.

(*Howerton v. Tate,* 68 N. C., 546, cited and approved).

CIVIL ACTION, tried before *Cloud, Judge,* Fall Term, 1872, Superior Court of ROWAN.

By consent of parties, his Honor found the facts in the case, which are the same as stated in the suit between the same plaintiffs and defendants decided at January Term, 1873, of this Court, and reported 68 N. C., 546, and which (those pertinent to the question involved) are set out in the opinion of *Justice Settle.*

Upon the facts found on the trial below his Honor gave judgment that the relators (plaintiffs in this action) were the rightful board of directors of the eastern division of the Western North Carolina Railroad, and not the defendants, and that the former be admitted to said office and the latter ousted therefrom; that the relators recover their costs.

From this judgment the defendants appealed; and the relator Howerton appealed, on the ground of the refusal of the Court to give him judgment for one year's salary, etc.

A. S. Merrimon and *D. Coleman,* for defendants.

McCorkle & Bailey, for the plaintiffs and for appellant Howerton.

SETTLE, J. We have held in *Howerton v. Tate,* 68 N. C., 546, that the board of directors of which the plaintiff Howerton was president were the only persons lawfully entitled to the possession of the eastern division (162) of the Western North Carolina Railroad, from and after 26 October, 1871. And we take it that Howerton continued to be the president of the road until it passed into the hands of the receiver appointed by the District Court of the United States for the Western District of North Carolina.

But during this whole period Howerton and his board were kept out of possession by the defendant Tate and his board, and this action is for the purpose of recovering the salary to which Howerton alleges he is entitled as president *de jure* of the road. That he is so entitled from the time of his demand upon the Tate board for the surrender of the road is clear, both upon reason and authority.

In the first place it is enacted by the Code of Civil Procedure, sec. 369, that "whenever an action shall be brought against a person for usurping an office, the Attorney-General, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto, and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof an order may be granted by a Judge of the Supreme Court for the arrest of such defendant and holding him to bail," etc. And section 373: "If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover by action the damages which he shall have sustained by reason of the usurpation by the defendant of the office," etc.

In *Douglas v. State,* 31 Indiana, 429, which was a contest for the office of county auditor, the authorities on this subject are collected and well considered, and we shall make no apology for quoting largely from that case.

There it is said that "Wright, being the auditor *de jure* from and after 11 November, 1867, was entitled to (163) exercise the franchises of the office and to receive the fees and emoluments thereof. The right of Douglas to hold the office ceased at the same time and he was thereafter a mere intruder, and his subsequent exercise of the office was a usurpation.

"The remaining question is as to the measure of Wright's damages. Is he entitled to recover the whole emoluments of the office received by Douglas for the time he unlawfully held possession, without any deduction for necessary clerk hire paid out by Douglas for discharging the duties of the office during the same time.

"And it is held that a person who is rightfully entitled to an office, although not in the actual possession of it, has a property in it and may maintain an action for money had and received, against a mere intruder who may perform the duties of the office for a time and receive the fees arising therefrom, and such intruder cannot retain any part of the fees as a compensation for his labor. This position is fully sustained by 1 Selwyn N. P., 81; *Lightly v. Clouston,* 1 Taunt., 112; *Allen v. McKean,* 1 Sumner, 276; *Bayton v. Dodsworth,* 6 Term, 681; *Dorsey v. Smythe County Auditor,* 28 Cal., 21."

The opinion in *Douglas v. State* goes on to say: "The official acts of Douglas during the time he usurped the office are held to be valid as to the public and third parties, simply because the public good requires that it should be so to prevent still greater mischief. But as to Douglas himself, they were illegal. Being a mere intruder, he can claim no benefit from his acts; he was not entitled to receive any compensation for the services rendered, either by himself or by those acting under him, and could not maintain an action for the recovery of the fees appertaining to the office."

In *Crawford v. Addison,* 6 Wal., 291, which was a contest for the mayoralty of Georgetown, in the District of Columbia, it is said that "the rule which measures the damages upon a breach of contract for wages or for freight, or for the lease of buildings, has no application. In these cases the party aggrieved must seek other employment or other articles for carriage, or other tenants, and the damages (164) recovered will be the difference between the amount stipulated and the amount actually received or paid. But no such rule can be applied to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical." In such cases the measure of damages is the salary received by the intruding party.

In our case Howerton, being the president *de jure* of the road, was entitled to receive the salary attached to that office; but Tate having usurped the same and having received a portion at least, if not all, of the salary, without the assent of Howerton, either expressed or implied, he must be held as having received it to the use of Howerton.

The case will be remanded, to the end that there may be an inquiry as to the amount of salary received by Tate, and that the case may be disposed of in accordance with the principles announced in this opinion.

PER CURIAM. Order accordingly.

Cited: McCall v. Webb, 135 N. C., 361.

OWEN F. HERRING v. PATRICK MURPHY.

1. An order of Court, sending back a report to a commissioner or referee, is sufficient notice to the party excepting to such report of its recommitment.

2. A commissioner, in applying the scale of depreciation to payments and receipts, applied the same at the date the several payments were made and the receipts given: *Held* to be proper and no ground of exception, in the absence of proof that the party kept on hand the identical money received.

3. A commissioner reports that the evidence upon which he stated the account "was the reports of the defendant as guardian to the Court, one voucher for defendant (which is allowed) and defendant's affidavit": *Held,* that was a sufficient statement of the evidence to justify a confirmation of the report.

(165) CIVIL ACTION (petition for an account and settlement), heard before *Russell, Judge,* Spring Term, 1873, Superior Court of SAMPSON County.

The plaintiff, who had been a ward of the defendant, filed his petition for an account and settlement at May Term, 1866, of the Court of Pleas and Quarter Sessions of Sampson County.

At February Term, 1867, it was referred to the Clerk to state an account. Before any report was returned this case was transferred to the Superior Court, and at Spring Term, 1870, the matter was referred to A. B. Chesnutt, who at the succeeding term made a report, which was filed, and at Spring Term, 1871, the defendant filed exceptions.

Fall Term, 1871, the judgment confirming the report of Chesnutt was set aside and the account referred to the Clerk, who returned a report at Spring Term, 1872, to which defendant filed ten exceptions. The account was recommitted to the Clerk, who reported, Spring Term, 1873, that the defendant owed the plaintiff $405.65. To this report the defendant again excepted, which exceptions are fully set out in the opinion of the Chief Justice.

His Honor below overruled the exceptions and gave judgment in favor of the plaintiff for the amount found due and stated in the report. From this judgment defendant appealed.

No counsel in this Court for plaintiff.
Smith & Strong, for defendant.

PEARSON, C. J. It is really painful to see how a spirit of litigation can induce parties to incur costs and consume the time of the Courts, after it is clear that the difference in the result, taking it either way, will only be a few dollars and cents, so that "the play is not worth the candle." Such are the words of *Lord Mansfield* in deciding a case like ours.

The first report shows a balance against the defendant of $407.30, 15 May, 1872.

To this the defendant files *ten exceptions*, and the (166) Court seeing that most of them merely involved matters of calculation, sends the matter again to the commissioner, who, after giving due consideration to the *ten exceptions* and correcting his calculations, reports a balance against the defendant of $505.97, a difference of $1.35, but reducing the exceptions to three instead of ten, the defendant being content to let seven of his exceptions pass off as fully answered by a difference of $1.35.

So our labor is brought down to the consideration of three questions:

1. The defendant was not notified of the recommitment. If this means that defendant was not notified of the fact that the matter had by an order in the case been referred back to the commissioner, it assumes gross laches on his part. If it means that he was not notified of *the time* at which the commissioner would review his report, and was taken by surprise, it was necessary to lay a foundation for the exception by an affidavit of the fact of surprise.

2. Because the scale (in reference to Confederate money) adopted by the commissioner is not correct. This seems to be the only ground on which the defendant rests; and as presenting a question which affects the merits, when scrutinized it amounts to but little.

The commissioner applies the scale to receipts and payments at the time money was received or paid out. This, on a general view, would seem to be fair, but, it is argued, "the receipts were first in point of time, and the scale was depreciating all of the time; so it makes a difference against the defendant."

That is true, provided he had kept the identical bills in hand, but he does not allege that this was the fact; on the contrary, it appears by the facts reported that the defendant

received the greater part of the fund, $553.83, in August, 1862, when there was but little discount, and in the absence of any allegation that he did not use the money, we assume that he did so, and having had the benefit of the money at a high figure, we can see no reason for objecting to the
(167) plan of the commissioner—apply the scale to receipts and disbursements at the dates, respectively.

3. "Because the commissioner does not state fully the evidence on which his report is made." The commissioner reports that the evidence upon which he stated the account "was the reports of the defendant as guardian to the Court, one voucher for defendant (which is allowed), and defendant's affidavit." So the report does set out the evidence.

The other clause of the exception, to-wit, "The report ought to state the facts and circumstances of the guardianship assumed during the war," is so indefinite and general as to be beyond the reach of judicial investigation.

We see no error in the ruling of his Honor by which the exceptions are overruled, the report enforced and judgment accordingly. Let this be certified.

PER CURIAM. Judgment affirmed.

JOHN C. LOVINIER, executor, etc., v. W. H. PEARCE, guardian *ad litem*, and others.

1. In a proceeding to subject real estate to sale for assets, after a report of the sale is returned and confirmed, the Judge of Probate, upon proper cause shown, has the right to set the sale aside and order a resale of the property.
2. And although the exercise of this right is discretionary with the Judge of Probate, still it is such a matter of legal discretion, involving a "matter of law or legal inference," that an appeal will lie from his decision.
3. There are *questions* of fact, as distinguished from *issues* of fact, which the Probate Judge in cases before him, and the District Judge in cases before him, may decide without a jury. And in a motion made to set aside a sale it is not necessary for the Judge in case of appeal to send to the appellate court a separate statement of the facts upon which his decision rests when the affidavits and counter-affidavits for and against the motion accompanies the case.

(*Thompson v. Cox,* 53 N. C., 314; *Wescott v. Hulett,* 67 N. C., 192; *Kluttz v. McKenzie,* 65 N. C., 102, cited and approved).

CIVIL ACTION (motion to set aside a sale and reopen biddings), heard before *Clark, Judge,* at chambers in CRAVEN County, 13 April, 1873.

The plaintiff filed his petition before the Judge of Probate to sell real estate for assets. From a decision of his, refusing to set aside the sale, an appeal was taken to the Judge of the district at chambers. From his decision setting aside the sale the plaintiff appealed to the Supreme Court. The facts are fully stated in the opinion of the Court.

Haughton, with whom was *Battle & Son,* for appellant.
Green and *Stephenson, contra.*

READE, J. The plaintiff, as executor, instituted (169) proceedings in the Probate Court for license to sell the real estate of his testator to pay debts. A sale was ordered and made by the plaintiff, and the land was bid off by one Long. The plaintiff reported a fair sale for a full price, and money paid. And thereupon the Probate Court confirmed the sale and ordered the title to be made, and the title was made to said Long, who immediately reconveyed to the plaintiff. It was also ordered that the cause be retained and that the executor, after paying the debts, should pay the surplus into Court for the benefit of the devisees.

Subsequently the defendant, Pearce, guardian of the defendants who are interested in the lands, filed an affidavit in the cause, setting forth that said Long bid off the land for and at the request of the plaintiff, and paid nothing for it, and reconveyed it to the plaintiff, and that the debts of the estate had not been paid, and that the plaintiff was insolvent, and moved that the order of sale and the order confirming the sale be set aside and a re-sale ordered.

The plaintiff files a counter-affidavit, in which he admits that, fearing the land would not sell for its value, he acquainted Long with the value, and through his representation Long was induced to bid off the land; and then he bought it from Long. He does not pretend that Long ever paid a dollar of the price, or even that he himself had accounted for the price and paid it to the debts of the estate. And he does not deny the allegation of the defendants that the debts of the estate, to pay which the land was sold, have not been paid, and that he is insolvent. In his report of the sale to the Probate Judge he had said that, instead of giving bond for the price, Long had paid the cash.

In his counter-affidavit he does not pretend that Long either complied with the terms of the sale by giving bond or that he had paid the cash. This, according to his own showing, was a fraud upon the Court.

Upon this showing it was clearly the duty of the (170) Probate Judge to set aside the sale. And this he says he would have done if he had been satisfied "beyond a doubt" of two things—first, that there was "collusion" between the plaintiff and Long; and secondly, that the land did not sell for a fair price.

What idea the Probate Judge had of "collusion," and what amount of evidence would have satisfied him "beyond a doubt," is not clearly seen. The sale was a sham; not a dollar was paid or secured to be paid, and the report of the sale was false, and the debts for which the land was sold have not been paid. By whatever name this may be called, it is certainly not such a transaction as can have the sanction of the Courts. The Probate Judge puts his refusal to vacate the order of sale upon the ground that the land sold for a fair price, and therefore the defendant's interests had not suffered. The answer is that it did not sell for anything at all. The sum bid may have been its value, but nothing was paid. And a further answer is that when a fraud appears, a party against whom it is practiced has the right to be relieved against it, and he is not put to show "beyond a doubt" that he will be injured. And where a court has been used as the instrument to perpetrate a fraud, the Court owes it to the administration of justice to set the matter right.

Upon the refusal of the Probate Judge to set aside the sale, the defendants appealed to the district Judge. His Honor reviewed the decision and set aside the sale. And from the decision of his Honor the plaintiff appealed to this Court.

1. The first point made for the plaintiff is that, taking the fraud to be as alleged, the remedy is by civil action and not by a motion in the cause, as this is. This point is made upon the supposition that upon the confirmation of the sale the cause is ended, and the Probate Judge had no further power over it. It is likened to a similar proceeding in the old County Court to make real estate assets in the hands of an administrator or executor. And several cases were cited by plaintiff to show that after the sale the County Court had no further power, and that a remedy for any fraud, etc., must be sought in a court of equity. *Thompson v.* (171) *Cox,* 53 N. C., 314; *Prescott v. Hewlett,* 67 N. C., 192.

The answer is that we are now in a court of equity as well as law. And a further answer is that the order in this cause confirming the sale expressly retains the cause and directs the plaintiff to pay the excess of the proceeds of sale, after paying the debts, into Court, to be distributed among the defendants. And how can that excess be known until a fair sale is had? And a further answer is that C. C. P., sec. 422, subsec. 9, authorizes a Judge of Probate "to open, vacate, modify, set aside or enter as of a former time decrees or orders of his Court in the same manner as courts of general jurisdiction."

2. The second point made for the plaintiff is that it was a matter of *discretion* with the Probate Judge whether he would set aside the sale, and that from his discretion there was no appeal.

True, it is a matter of discretion; but then the discretion is not willful or arbitrary, but legal. And although its exercise be not purely a matter of law, yet it "*involves* a matter of law or legal inference," in the language of The Code, and an appeal will lie.

3. The third point made by the plaintiff is that we must overrule his Honor because he does not find the facts upon which his opinion is founded.

When an *issue* of fact is made before a Probate Judge, The Code, sec. 490, requires that it shall be *transferred* to the Superior Court in time for trial. And then, of course, the trial must be by jury, if either party require it. But there are *questions* of fact, as distinguished from *issues* of fact, which the Probate Judge in cases before him, and the district Judge in cases before him, may decide without a jury, as in cases involving complicated accounts where the mode of trial under C. C. P. is by reference and report and exceptions. *Kluttz v. McKenzie,* 65 N. C., 102. And so in a case like the present, where a motion is made to vacate an order made in *any* court the Court must of necessity hear the facts upon which (172) the motion is founded, and the parties are not entitled, as a matter of right, to make an issue of fact and demand a jury trial, although it may be that cases may arise in which the Court will order an issue to be tried by the jury to aid the Court. In this case before us the facts appeared before the Judge of Probate in the affidavits of the parties; and although they do not agree in all particulars, yet in the materials they do. So that in what is alleged by the defendant and not denied by the plaintiff, and in what is admitted by the plaintiff, we have the state of facts hereinbefore set forth. These facts were sent up by the Probate Judge to the district Judge, and by his Honor to us. It is true that his Honor does not make out a separate statement of the facts, as usually it is *best,* and as in cases where the facts are complicated or the testimony contradictory it is *necessary* for him to do, yet the facts do distinctly appear.

To show how the facts ought to have been made out and the case made up, the plaintiff's brief refers to C. C. P., sec. 110. But that never has been applicable to an appeal from a *Probate Judge*, but only to an appeal from the *Clerk* to the Judge in matters of pleading and practice in civil actions when they were returnable before the Clerk. But it is not applicable to *any* case now, as civil actions are now returnable in term time before the Judge himself.

There is no error. This will be certified, to the end that the Court below may proceed according to law.

PER CURIAM. Judgment affirmed.

Cited: Wahab v. Smith, 82 N. C., 233; *Trull v. Rice,* 92 N. C., 575; *Spencer Ex-parte,* 95 N. C., 275; *McMillan v. McMillan,* 123 N. C., 580.

(173)

CARSON & GRIER v. C. J. LINEBURGER and others.

In a suit on a note, the payment of which is relied on as a defense, one of the defendants testified that at the time the note was made it was agreed that it was to be paid in certain cotton goods, and that the defendants delivered the goods to their agent to be delivered to a firm of which the payee was a member, according to such agreement, and the agent testified that he sold and delivered the goods to the firm on the usual time of thirty days, nothing being said about the note: *It was held* that this was *some* evidence of payment which ought to have been submitted to the jury, and that his Honor below erred in charging that there was *no* evidence of payment.

CIVIL ACTION (suit on a note), tried at the July (Special) Term, 1873, of the Superior Court of MECKLENBURG, before *Moore, Judge.*

The plaintiffs, as endorsees of one William Richards, sued defendants on a note for $549.32 and interest, less a credit of $200, 26 August, 1869; date of note, 19 January, 1869.

Defendants rely on the plea of payment. On the trial, in support of the plea of payment, Caleb Lineburger, one of the defendants, testified that when the note was made and delivered to William Richards it was understood and agreed between the parties that the note was to be paid by the makers, who were manufacturers of cotton goods, delivering to the firm of William Richards & Co., merchants in Charlotte, cotton goods in payment thereof. That William Richards, the payee in the note, was a member of the firm of William Richards & Co.; that when the $200 was paid it was done as a favor to Richards, who had occasion for the money, and it was then again agreed that the balance of the note was to be paid in goods. This defendant further testified that goods were delivered to one Pasour, to be delivered to William Richards & Co. before the transfer of the note to the present plaintiffs of a greater amount in value than the balance due on the note.

William Richards, the payee, testified that there was no such agreement as to the manner in which the note was to be paid, either at its making or when the $200 was paid; (174) that when the goods were delivered by Lineburger & Co. to William Richards & Co. he held a claim, other than the note, against Lineburger & Co. for cotton he had sold and delivered to them in 1864, upon which claim the goods were to be credited.

Lineburger, being recalled, stated that when the note in suit was given it was in settlement of all demands of Richards, and that his firm owed him nothing on any previous cotton transaction.

One Pasour, for defendants, testified that he was the general agent of Lineburger & Co. for the sale and delivery of goods, and that between the date of the payment of the $200 and the transfer of the note to the plaintiffs he sold and delivered cotton goods to William Richards & Co. to the value of $700; that the goods were charged to that firm and sold in the usual manner on thirty days' time; that he repeatedly called on William Richards & Co. for payment, but that no payment was made; that on one occasion when he called on them for payment, Bauman, one of the firm, offered to pay the account in cotton which the firm had at Brevard Station; that he accepted the offer, but for some reason never got the cotton; that there was no cotton there.

It was also in evidence that Lineburger & Co. brought suit on their claim against William Richards & Co. for the goods sold and delivered by Pasour, and had given no credit for the note sued upon in this case.

His Honor ruled that there was no evidence of payment to be submitted to the jury; whereupon a verdict was ordered to be rendered for the plaintiff. The defendants appealed.

J. H. Wilson, for appellants.
R. Barringer and *Vance, contra.*

Reade, J. The only question is whether there was *any* evidence of the payment of the note. The defendant testified that when the note was executed it was agreed that it was to be paid off in goods from the defendant's factory, and that he subsequently delivered goods to his agent, Pasour, to deliver to the payee more than sufficient to pay the (175) note. This was evidence tending to show the first step towards the payment. The defendant then introduced the agent, Pasour. If Pasour had testified that he delivered the goods in payment of the note, that, in connection with the testimony of the defendant, if believed, would have been full proof. Pasour does say that he delivered the goods, but he says more than that. He says that "he sold and delivered the cotton goods to the payee to the amount of the note, and that the goods were sold on the usual time, thirty days." And so it is contended that this disproves the delivery of the goods in payment of the note. What view the jury would have taken of the testimony we cannot tell. It may be that, viewing it together with the defendant's testimony, they might have found that Pasour was mistaken as to its being an ordinary sale on thirty days' time, and then to be paid in cash and not applied in satisfaction of the debt. The jury might have found that, while Pasour thought it an ordinary sale, yet the parties understood it differently. Especially might they have so found in view of the fact that both parties to the note swear that he was mistaken. The defendant swears he was mistaken, because he knows that he sent the goods by him to pay the note. And the payee, who was also examined as witness, swears that he did not take the goods in payment of *that* note, but that at the time he received the goods he had another claim against the defendant older than the note for cotton which he had sold him, and that the goods delivered "were to be credited" on that older debt. And then the defendant swore that the old debt had been included in the note, so that there was no such old debt. All this, taken in connection with the presumption that the payee would not have bought goods to pay money for, when he held a debt against the defendant, might have been left to the jury as evidence tending to show that the goods were delivered in payment of the note.

There is error.

PER CURIAM. *Venire de novo.*

BYNUM, J., did not sit.

(176)

JAMES S. PHILLIPS v. WILLIAM H. TREZEVANT.

The Supreme Court has no power to compel, by process of attachment, a defendant to pay a judgment against him for costs recovered by a plaintiff in this Court.

(*Brown v. Long*, 22 N. C., 138, cited and approved).

MOTION, at this term, after notice, for an attachment against the defendant in the above-entitled cause, to compel him to pay the costs adjudged against him in this Court at June Term, 1872.

The plaintiff, in the motion, states on oath that the defendant is fully able to pay off and discharge the judgment; that he has command of large sums of money, but has declared that none of it shall be applied in discharge of the recovery of the plaintiff; and that he has converted all his tangible property into money, or secretly and fraudulently disposed of it, to the end that he may defy the process of the Court and deprive the plaintiff of his recoveries, etc.

After argument, the motion was refused.

H. W. Guion, for the motion.

The statute of contempts, Acts of 1868-'69, sec. 4, page 426, not altered by Act of 1870-'71, page 337, C. C. P., seems to take it for granted that it is a contempt and attachable. Sections 257 and 261, subsecs. 1, 264 and 274; Bacon's Abr. Attachment and the many American cases cited; *State v. Palin,* 63 N. C., 473.

Wilson & Son and *Jones & Johnson, contra.*

RODMAN, J. This is a motion on the part of plaintiff for an attachment against the defendant, in order to compel him to apply money, of which it is said he is possessed, to the payment of two judgments for costs which plaintiff recovered against him in this Court.

(177) We are of opinion that no power has been given to this Court to issue an attachment in such a case.

It is conceded that the provisions of the C. C. P. respecting supplemental proceedings (sections 264 to 274) are not applicable to this Court; but we are moved, nevertheless, to proceed to subject to execution the intangible property of the defendant, substantially as a Superior Court would do under such proceedings. That no such power is given to this Court, when it is expressly given to the Superior Court, is an argument that it was not intended that this Court should have or use such powers. We think the omission to give such powers was wise, for they could not be used without inconvenience and the risk of injustice and oppression to the debtor.

The argument of the plaintiff is that where there is a right there is a remedy, and, as in this case, the money of the defendant cannot be reached by the ordinary writs of execution, and it is liable to execution, this Court will give the plaintiff a remedy, although none is expressly provided by statute, rule of Court, or usage. This principle is illustrated by *Brown v. Long,* 22 N. C., 138, where a debtor who had been discharged as an insolvent, and whose person was thereby protected from arrest, afterwards acquired choses in action, and it was held that they could be subjected to the satisfaction of a judgment creditor by process of attachment in equity, thus anticipating the provisions of C. C. P. for supplemental proceedings. But in this case the principle does not apply, for the plaintiff has a remedy which the law deems adequate.

Only two cases occur to us in which a judgment of this Court can be unsecured by an undertaking on appeal.

1. Where an appellant recovers, whether a debt and costs, or costs only, against an appellee.

2. Where a party against whom judgment is given below does not give such an undertaking as suspends execution, and the judgment is afterwards modified in this Court.

In all of these cases, except where the judgment is against an appellee for costs of this Court, we are of opinion that this Court has the power to direct the Superior (178) Court to enter there such judgment as it ought to have given, notwithstanding this Court has entered such judgment here. No inconvenience that now occurs to us is likely to arise from such a course, for the process of both Courts will be always under their control. Upon the judgments so entered in the Superior Court the plaintiff can take his supplemental proceedings.

In the case of a judgment against an appellee for the costs of this Court it may be doubtful whether the Superior Court could be required to enter a similar judgment there, for it never could or ought to have been a judgment of that Court. But in such a case the plaintiff may bring an action upon his judgment in the proper Court, and on obtaining judgment there, have the benefit of supplemental proceedings.

PER CURIAM. Motion refused.

McCOMB and WALLACE, administrators, v. THE NORTH CAROLINA RAILROAD COMPANY.

What an agent says or does within the scope of his agency and while engaged in the very business is evidence for or against his principal. His declarations, made subsequently, as to what he had done, is not evidence, though he may continue still to act as agent generally, or in other matters.

(***Smith v. Railroad,*** **68 N. C., 101, cited and approved).**

CIVIL ACTION (commenced in the Court of Pleas and Quarter Sessions, 1857), tried before *Moore, Judge*, July (Special) Term, 1873, Superior Court of MECKLENBURG.

(179) The suit was originally commenced by one Farrow, the intestate of the plaintiffs, against the defendant as a warehouseman, declaring on a special contract to keep and deliver to plaintiff's order, on demand, four bales of cotton, and for a failure to deliver said cotton, also declaring in the common counts. Defendant pleaded "general issue."

For the plaintiff Dr. Gilmer testified that in December, 1856, he shipped on the road of the defendant to his own order four bales of cotton to Charlotte; that he sold this cotton to plaintiffs' intestate by sample; that a clerk of said intestate and himself went to the depot of the defendant and found the cotton in the depot building; that they weighed it on the scales of the defendant in the depot and left the cotton on the scales. The plaintiffs' intestate was a buyer and shipper of cotton to South Carolina.

A. H. Martin, for plaintiff, testified that in December, 1856, he was agent of the Charlotte and South Carolina Railroad Company at Charlotte, and extending from thence to Columbia, S. C.; that a man named Powe was the station agent of the defendant at Charlotte.

Plaintiff proposed to prove by this witness the declarations of Powe, made three or four days after the cotton in question was weighed and left at the depot, in a conversation that occurred when the cotton was first demanded. This was objected to by defendant, but received by the Court. Defendant excepted.

The witness then further testified that three or four days after the cotton was weighed and left at the depot the plaintiffs' intestate, in the presence of the witness, asked Powe what he had done with the cotton, to which he replied: "I turned it over to the Charlotte and South Carolina Railroad Company." Witness then said "You did not turn it over to me," and asked what evidence he had. He replied that he turned it over to one of the loading clerks of the Charlotte and South Carolina Railroad Company; that he had no receipt. This was all the evidence.

The reply of this witness to Powe, denying that the cotton had been turned over to him, was objected to by defendant and admitted by the Court. Defendant again excepted.

The defendant requested the Court, in writing, to (180) give the jury the following instructions:

1. That there is no evidence that the defendant had the cotton as warehouseman for the plaintiffs' intestate, or as a bailee, and that the plaintiffs cannot recover.
2. There is no evidence that said intestate lost any of the Gilmer cotton.

The instructions were refused by his Honor, who charged the jury as to the different degrees of care to be taken in matters of bailment, to which there were no exceptions. He further instructed the jury that the defendant could only be held liable, from the evidence, as a warehouseman; that the declarations of Powe were evidence that the defendant held the cotton for the plaintiff's intestate, and that if the jury should find that when Powe found the cotton on the scales he assented to hold the cotton for Farrow, the said intestate, there would be ground to charge the defendant as a warehouseman.

Defendant excepted to this charge, and for refusal to give the instructions prayed for.

The jury returned a verdict for the plaintiffs. Rule for a new trial; rule discharged. Judgment, and appeal by the defendant.

Barringer and *McCorkle & Bailey,* for appellant.
J. H. Wilson, contra.

Reade, J. What an agent says or does within the scope of his agency and while engaged in the very business is evidence for or against his principal as part of the *res gestæ.*

But evidence of his declarations, made subsequently as to what he *had done,* is inadmissible. It is only hearsay. And this although he may continue to act as agent in other matters, or generally. *Smith v. Railroad,* 68 N. C., 107. That is decisive of this case.

If the plaintiff left the cotton on storage with the (181) defendant, and the defendant failed to deliver it on demand, he is *prima facie* liable. If it was lost or destroyed, then the question of negligence arises. But that is not now before us.

There is error.

Per Curiam. *Venire de novo.*

Cited: Stenhouse v. Railroad, post, 545; *Henry v. Willard,* 73 N. C., 43; *Black v. Baylees,* 86 N. C., 534; *Southerland v. Railroad,* 106 N. C., 105; *Egerton v. Railroad,* 115 N. C., 648; *Albert v. Ins. Co.,* 122 N. C., 96; *Darlington v. Tel. Co.,* 127 N. C., 450.

E. O. ELLIOTT v. E. J. ROBARDS and others.

A sells a tract of land to B, retaining the title until the purchase-money is paid. B makes a payment on the debt due A, and then sells his interest to C; A and B agree to obtain from the proper Court a decree of sale, which is made, the land sold and is purchased by C (the title still being retained until the purchase-money is paid), who gives his bonds to A and B for their respective shares. C being unable to pay his bonds, A brings this action against the other parties, asking for a sale of the land and the proper distribution of the purchase-money; the land is sold and A becomes the purchaser, B claiming a *pro rata* share of the proceeds of sale: *Held*, that B, until he paid the debt to A for the first purchase, was entitled to no part of the proceeds of sale; and further, that if the land sold for more than B owed A, B was entitled to the surplus and the surrender of his note; if it sold for less, B's note must be credited with the amount it did sell for.

CIVIL ACTION, tried before *Mitchell, Judge,* Fall Term, 1873, Superior Court of CATAWBA.

The case is brought to this Court upon the appeal of one of the defendants from the judgment of the Court below sustaining certain exceptions of the plaintiff to the report of the Clerk.

The facts are fully stated in the opinion of the Court.

M. L. McCorkle, for appellant.

Caldwell and *Armfield, McCorkle & Bailey* and *Schenck, contra.*

RODMAN, J. As the defendants, Wyatt and Wynne, (182) do not appeal, it is only necessary to consider the case between the plaintiff and Mrs. Robards. By her demurrer she admits the fact as set forth in the complaint, and that was the only source from which the Judge could derive a knowledge of them. Mrs. Robards appeals only from the judgment respecting the appropriation of the fund in Court, and that only is examinable here.

The material facts (about which there is no dispute at all) are these:

The plaintiff, being the owner of the White Sulphur Springs land, in or about 1861, agreed with Mrs. Robards to sell her the land for $10,000, title to be made when the purchase-money should be paid. She entered into or continued in possession and made a part payment on the note. In 1864 she agreed to sell her interest to Wyatt and Wynne for $10,000. About the same time the plaintiff agreed to sell them his estate for $10,900, payable in gold in five years, without interest. Wyatt and Wynne made their notes to each of the parties accordingly. It was also agreed that the plaintiff and Mrs. Robards should unite in a petition to the Court to have the lands sold according to the terms agreed on. The Court decreed a sale, and Wyatt and Wynne purchased for $20,000 and gave their notes to plaintiff for $10,900 and to Mrs. Robards for the remaining $10,000. The sale was on the terms that no title should be made until payment of the price. Wyatt and Wynne took possession, but made no payment, and at Spring Term, 1871, of Catawba Superior Court both plaintiff and Mrs. Robards obtained judgments against them. Plaintiff thereupon brought this action, in which the Court decreed that the land should be sold so as to give to the purchaser a title against all parties, but reserved its determination of the relative rights of plaintiff and of Mrs. Robards in the proceeds of the sale. The land was sold and bought by plaintiff for $10,700.

(183) The parties now ask the Court to adjudge their respective rights in this fund.

It must be admitted that prior to the transaction with Wyatt and Wynne Mrs. Robards could claim a title on payment to plaintiff of her debt to him. Plaintiff retained the legal title as a security for this debt, and no Court can divest him of it so long as this debt *exists unpaid.*

It is contended, however, for Mrs. Robards that the transaction of plaintiff with Wyatt and Wynne had the effect to extinguish her debt to him. We fail to perceive the equity of the proposition.

Wyatt and Wynne, having the equity of Mrs. Robards, could have acquired the title of plaintiff by paying him what Mrs. Robards owed. They not being then able to do that, the plaintiff, in consideration that the payment should be made in gold, agreed that they might have five years' credit without interest. It does not appear what was the precise amount of Mrs. Robards' debt at this time, nor how nearly the sum of $10,900 to be paid to plaintiff approximated to it—probably very closely. There is no evidence that plaintiff was endeavoring to secure anything more than he was fairly entitled to.

It is evident that by this transaction the plaintiff did not receive payment of the Robards debt. If he had received the notes of Wyatt and Wynne in *payment* for his interest, the case would be different. But he retains the title as a security for future payment. The same facts show that he did not intend to *release* Mrs. Robards or his hold on the land as a security for his debt. No principle occurs to us on which he must be construed to have done so against his intention. Mrs. Robards was not injured, or even damaged, in any way by the plaintiff's conduct. There was no moment at which she could not have obtained a conveyance from plaintiff on paying her debt to him. Her loss is altogether from the insolvency of Wynne and Wyatt and the deficient value of the land. To give her any part of this fund, which represents the land, without payment of her debt, would be to give her what she has never given any consideration for, and (184) which the plaintiff never contracted to give her, except on a condition precedent which she has never performed.

If the debt of Mrs. Robards, after deducting the payment, is just equal to the fund in Court, the plaintiff is entitled to receive the fund and is required to surrender to Mrs. Robards her note. If her note exceeds the fund, he will credit the note with the amount of the fund. If her note is less than the fund, the excess after paying her note will be paid to her. These facts can be ascertained by a simple arithmetical calculation which may be made by the Clerk on a reference limited to that. If the fund were in this Court the decree might be made here, but as it is in the Court below, the case must be remanded in order that the decree may be entered and carried into effect there.

As the action of both parties has tended to obscure somewhat a very simple matter, neither party will recover costs in this Court.

PER CURIAM. Judgment accordingly.

BYNUM, J., did not sit.

(185)

VIRGIL S. LUSK, assignee, v. E. CLAYTON.

1. The effect of a reference to arbitrators is very different from that of a reference under The Code. Arbitrators may choose an umpire; they are not bound to find the facts separately from their conclusions of law; they are not bound to decide according to law, and their award may be general, thus "that plaintiff recover $—— and costs."

2. An agreement that an award shall be a rule of Court is merely an agreement to confess judgment according to the award, when it shall be made. If the parties referring their matters in controversy have no suit in Court, the Court will not compel a performance of their agreement by attachment, as it will if the subject matter has been brought in Court by suit or otherwise.

(*Leach v. Harris,* 69 N. C., 532; *Alexander v. Burton,* 18 N. C., 469; *Cunningham v. Howell,* 23 N. C., 469; *Ryan v. Blount,* 16 N. C., 382, cited and approved).

CIVIL ACTION, tried at July (Special) Term, 1873, Superior Court of BUNCOMBE, before *Albertson, Judge,* a jury trial having been waived.

The plaintiff, assignee in bankruptcy of B. I. & I. B. Alexander, surviving partners of Patton & Alexander, brings this action against the defendant, Ephraim Clayton, to recover the sum of $579.01, the amount of a store account made with said Patton & Alexander.

At Spring Term, 1873, of Buncombe Superior Court, *"It was ordered* by the Court, with the consent of the parties, that all the matters of difference in this case be referred to E. I. Alston and A. T. Summey, with authority to choose an umpire in case of a disagreement, and their award or the award of the umpire is to be a rule of Court." The cost of the reference, etc., to be under the direction of the said arbitrators.

At the next ensuing term, July (Special) Term, 1873, the arbitrators return a report substantially as follows:

"We find as matters of fact:

"1. That B. I. & I. B. Alexander were the surviving partners of the firm of Patton & Alexander; that James A. Patton was the deceased member of said firm; that the surviving members of the firm went into voluntary bankruptcy, and that the plaintiff herein is their assignee.

"2. That one James W. Patton was, before and during the time embraced in making the account sued on, indebted to the defendant in this action, E. Clayton, largely in excess of the account, the basis of this suit; and that there was an agreement or understanding between said James W. Patton, E. Clayton, the defendant, and James A. Patton, of and representing the firm of Patton & Alexander, to the effect that Clayton, the defendant, should make this account sued on in this action, and that it should be charged to James W. Patton, so long as the amount was less than the sum (186) James W. Patton owed the said Clayton.

"3. That said account was thus settled, although the same does not appear to have been charged on the books of the firm to James W. Patton or credited to the defendant, E. Clayton; and that in our opinion nothing is due from the defendant to the plaintiff in this action.

"4. We therefore award that the defendant have judgment for his costs in this behalf expended, and that he be hence discharged and go without day.

"We further report that we have been occupied about the adjudication of this matter three days.

(Signed) "E. I. ALSTON,
"A. T. SUMMEY,
Referees."

"Asheville, N. C., July 31, 1873.

At the same term the plaintiff excepted to the foregoing report, assigning as reasons:

1. Because the arbitrators or referees make an *award,* when by the terms of the order of Court they were referees.
2. That the fact of the agreement upon which they base their judgment is stated too indefinitely to authorize a judgment.
3. That the legal conclusion in the report is erroneous.
4. That the report is uncertain and vague.

These exceptions were overruled, the report confirmed and judgment in accordance therewith, from which judgment plaintiff appealed.

A. T. & T. F. Davidson, for appellant:

1. The arbitrators do not distinctly find the facts such as will authorize a judgment and be conclusive in the matter. *Gibbs v. Berry,* 35 N. C., 388; *Patton v. Baird,* 42 N. C., 255; *Cannady v. Roberts,* 28 N. C., 422.

2. That even if the alleged agreement with James A. Patton and J. W. Patton was made, it was unauthorized, and the other parties were not bound. Collyer Partnership, (187) secs. 196, 421, 439, 440, 473 (2), 483, 501; *Long v. Carter,* 25 N. C., 238; 59 N. C., 49; 3 N. C., 393, 590.

3. The burden of showing assent of the other partners is on the defendant. Note 1 to section 501, Collyer on Part.

J. H. Merrimon, contra, argued:

It is well settled that arbitrators are not bound to decide a case according to law, for they are a law unto themselves and made to decide according to their notions of justice and without giving any reasons. *Leach v. Harris,* 69 N. C., 537.

Arbitration and reference distinguished. *Hilliard v. Rowland,* 68 N. C., 508.

An award must have upon its face certainty to a common intent, or it will be void. The award must be such as a judgment can be entered upon and which will settle all the matters referred to. *Carter v. Carson,* 64 N. C., 332; *Harralson v. Pleasants,* 61 N. C., 366.

RODMAN, J. All or any of the issues in an action may be referred by consent of the parties. C. C. P., sec. 244. The referees must state the facts found and the conclusions of law separately. Their report as to the facts has the effect of the verdict of a jury. Section 248. We do not think that it was intended by these sections to deprive parties of the right to refer all or any matters in controversy to arbitrators with power to make an award, which should be a rule of Court. The parties can undoubtedly make such a reference, and the only question possible would be whether the Judge would recognize the award and make it a rule of Court, enforceable by its process, or leave the parties to their action on the arbitration bond or other like remedy. We cannot suppose it was intended to abolish so useful a mode of adjusting rights by indirection, and we think that the power to make an award a rule of Court still exists as incidental to every court under its power to enter judgment by confession. *Leach v. Harris,* 69 N. C., 532.

(188) An agreement that an award shall be a rule (or

judgment) of Court is merely an agreement to confess judgment according to the award when it shall be made. If such agreement be made by persons having no suit in Court respecting the matters referred, a Court (in this State at least) will not compel performance of the agreement by attachment because the parties have not put themselves under its jurisdiction, but will leave them to their remedy by action on the agreement. *Alexander v. Burton,* 21 N. C., 469. If, however, such an agreement is made between the parties to a suit, the Court having jurisdiction over the persons and the subject-matter will compel the parties by attachment to perform the agreement by confessing judgment according to the award, or, as a more direct way to the same end, will (in this State at least) enter judgment according to the award. *Cunningham v. Howell,* 23 N. C., 9.

The effect of a reference to arbitrators is very different from that of a reference under The Code. Arbitrators may choose an umpire; they are not bound to find the facts separately from their conclusions of law; they are not bound to decide according to law. Their award may be entirely general, as, for example, that plaintiff recover $. . . . and costs, or that defendant go without day, etc. *Leach v. Harris, ante.* Ordinarily, if their award be within their powers and unaffected by fraud, mistake, surprise or irregularity, the Judge has no power over it except to make it a rule of Court and enforce it according to the course of the Court.

If, however, the arbitrators think proper, they may find the facts and the law separately. And as it thus appears that they intended to decide according to law, if they clearly mistake the law the Judge may set aside the award, and perhaps in some cases give such judgment as they ought in law to have given. Morse Arb. & Award, 292. *Boston Water Power Co. v. Gray,* 6 Metc. (Mass.), 131; *Ryan v. Blount,* 16 N. C., 382; *Leach v. Harris, supra.*

We thing it clear that in the present case the reference was to arbitrators to make an award. The only (189) part of the award which we think it material to refer to is this: The arbitrators find that during the time in which the defendant was running up the account sued on, James W. Patton (not a member of the firm of Patton & Alexander) was indebted to the defendant in an amount larger than that sued for, and it was agreed between J. W. Patton and the defendant and James A. Patton (a member of the firm) that defendant should buy goods from the firm from time to time, and that they should be charged to J. W. Patton. Under this agreement the goods sued for were purchased. The arbitrators award that defendant go without day, etc. It is objected that the conclusion of law is not supported by the facts. We think it is. It did not appear that Patton, the partner, had any interest in the debt from J. A. Patton to the defendant, or that he was acting in any way for his individual advantage. Surely one partner may sell goods of the firm to one person on the credit of another. Nothing is more common.

PER CURIAM. Judgment affirmed.

Cited: Pickens v. Miller, 83 N. C., 549; *Moore v. Austin,* 85 N. C., 183; *Keener v. Goodson,* 89 N. C., 276; *Robbins v. Killebrew,* 95 N. C., 22; *Jackson v. McLean,* 96 N. C., 479; *Reizenstein v. Hahn,* 107 N. C., 158; *Hurdle v. Stallings,* 109 N. C., 7; *Wyatt v. Railroad,* 110 N. C., 247; *Henry v. Hilliard,* 120 N. C., 486; *Ezzell v. Lumber Co.,* 130 N. C., 206.

CHARLES H. WILLIAMS v. GREEN WILLIAMS, surviving partner, etc.

In an action on an account due 1 January, 1861, to which the statute of limitations is pleaded, the time during which the statute is to run must be computed from said 1 January to 20 May, 1861, and then from 1 January, 1870, till the day the summons was issued.

(*Johnson v. Winslow,* 63 N. C., 552; *Smith v. Rogers,* 65 N. C., 181, cited and approved).

CIVIL ACTION, commenced before a justice of the peace and carried by appeal to the Superior Court of PERSON, in which it was tried before *Tourgee, Judge,* Fall Term, 1873.

(190) The plaintiff complained for the non-payment of $200, due by account for work and labor during the year 1860, and demanding interest from 1 January, 1861. To this complaint the defendant pleaded the statute of limitations.

The justice gave the plaintiff judgment, and the defendant appealed. On the trial below his Honor, holding that the statute barred the action, reversed the judgment of the justice and gave judgment for the defendant. From this judgment the plaintiff appealed.

Jones & Jones, for appellant.
No counsel *contra* in this Court.

READE, J. The only question is whether the action is barred by the statute of limitations, three years.

The claim was due 1 January, 1861. The action was commenced 27 April, 1872. More than twelve years had elapsed. But then, by divers statutes, the statute of limitations was suspended from 20 May, 1861, until 1 January, 1870, as is fully explained in *Johnson v. Winslow,* 63 N. C., 552, and *Smith v. Rogers,* 63 N. C., 181.

The time to be counted in this case is from 1 January, 1861, to 20 May, 1861, four months and twenty days, and from 1 January, 1870, to 27 April, 1872, when the action commenced—two years, three months and twenty-seven days—which, added to the former time, makes two years, eight months and seventeen days.

It is suggested that The Code, sec. 16, repeals the law of the limitations of actions as provided in the Revised Code, chap. 66, and substitutes the limitations mentioned in C. C. P., title IV. So it does; but that is prospective only, and has an express saving for "all actions already commenced, or rights of action already accrued, but the statutes in force previous to the ratification of this act shall be applicable to such cases," etc.

So that, in this case time is to be counted or not counted, just as if the C. C. P., title IV, had no (191) existence. In other words, the time is not counted from 20 May, 1861, to 1 January, 1870.

There is error.

PER CURIAM. Judgment reversed and judgment in this Court for plaintiff.

R. W. GLENN v. THE FARMERS BANK OF NORTH CAROLINA.

1. The refusal of the Judge below to consolidate several actions brought to recover the amount of certain bills issued by a bank, the defendant, where it did not appear that the bills sued on were all of like character and emitted under the same circumstances, was right, and the defendant was not entitled to a new trial on account of such refusal.

2. The rule that when two witnesses of equal credibility swear affirmatively and negatively as to a certain issue, credit is to be given to the affirmative statement in preference to the negative, is not a rule of law to be laid down by the Court, and it was no error in the Judge to refuse so to charge.

3. If a statute declares a security void, it is void in whosesoever hands it may come. If, however, a negotiable security be founded on an illegal consideration (and it is immaterial whether it be illegal at common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder, or of one claiming through such holder.

(*Buie v. Kelly*, 52 N. C., 266; *Weith v. Wilmington*, 68 N. C., 24, cited and approved).

CIVIL ACTION, commenced in a justice's court, and from thence carried by appeal to the Superior Court of GUILFORD, where it was tried before *Tourgee, Judge*, at Spring Term, 1873.

Plaintiff sued out twenty-one summons before a justice of the peace for the recovery of certain bank bills issued (192) by defendant, and, obtaining judgment, the defendant appealed to the Superior Court. Upon the call of the case his Honor ordered pleadings to be filed, and the defendant moved to consolidate the several suits into one action. Motion refused, and defendant excepted.

Defendant then moved that the demurrer raised in the plaintiff's replication to the answer be overruled. Motion refused on the ground that there was also an issue of fact as to the want of notice involved; and his Honor directed the following issues to be submitted to the jury:

1. Did defendant issue the notes (bank bills) sued on as a loan to the State of North Carolina and the county of Guilford to aid in the rebellion, or were any parts of said notes so issued, and if so, what parts?

2. Had the plaintiff notice of the fact, if found, that the

notes were issued to aid the rebellion at the time he received them?

The jury responded to these issues in the negative, finding that the notes were not issued to aid the rebellion, and that the plaintiff at the time he received the same had no notice of the cause or reason of their issue.

The evidence on the trial of the following issues was substantially as follows:

For the plaintiff, he himself stated that he obtained the bills sued for in the ordinary course of business, and gave value for them, and that he had demanded payment therefor from the cashier of the bank at their banking-house in Greensboro on 21 February, 1871, and was refused.

On cross-examination, the plaintiff stated that he purchased the notes on or about 18 February, 1871, of Wilson & Shober, bankers and brokers in Greensboro, at the price of forty to forty-five cents in the dollar, to the amount of $5,600, and that he paid cash for some, and for the residue he gave his note; that of this sum $700 secured by his own note is still unpaid. He further testified that he had no notice that any portion of the notes of defendant had been issued or was bound to the State or county of Guilford for the (193) support of the war, at or before his purchase, and denied that he had been informed by the cashier, William A. Caldwell, that there was a class of bills which Caldwell denominated "war issues" and which the bank refused to receive except at very low rates as compared with other issues.

The cashier, William A. Caldwell, on the part of the defendant, stated that the bank had made no issue of its notes after August, 1860, until June, 1861; that on the 10th of the latter month, on application by the Public Treasurer, the bank by its officers, filled up and signed and loaned to the State its notes to the amount of $30,000; that in July, October and November following, it made further loans to the State of its own bills, through Mr. Courts, the Public Treasurer, to the amount in the aggregate of $95,000. Witness further stated that during the same period the bank in like manner loaned to the county of Guilford, for the purpose of equipping companies to aid the Confederate government in the war pending the sum of $5,500. Witness identified those bills, which he denominated "war issues," by their having the letter "B" above the number, "1401," and the whole of the issue marked with the letter "C," saying that the date of the bills was no criterion or guide in distinguishing them; and of the bills sued on, being of the denomination of five and ten dollars, to the amount of $200, he specified $100 of that amount by the letters and numbers as being of the class of war issues. He further stated that the bank in 1862 purchased of the Public Treasurer bonds of the State, issued for the purpose of paying the tax levied by the Confederate government, to the amount of $48,000, which bonds the bank had sold, except about $2,700 of the same. The latter were exhibited. This witness could not say that the $100 of the "war issue" sued upon by the plaintiff was of the parcel loaned to the State or to the county of Guilford, or was the same used in the purchase of State bonds. It might have been that he made the (194) loans with bills of other banks in part, as they might be mixed promiscuously in the till of the bank, and the new issue might have been kept to supply the vacuum. He could not say that the bills in controversy did not get into circulation in that way—that is, in the usual daily transactions with the customers of the bank, though he was of opinion that they were all issued to supply the loans to the State and the county and in the purchase of the bonds, as before related.

The witness further stated that before the plaintiff in this action purchased the notes, in a conversation between them relating to the payment of a debt the plaintiff owed the bank, and its satisfaction in the notes of the bank, he, the witness, informed the plaintiff that he, as cashier, would not receive in such payment more than one-third of the amount in "war issues," and that he further informed the plaintiff that there was a certain class of notes loaned the State for war purposes which he included in this name, and that they would not be taken by the bank except at very low rates. Witness stated to plaintiff that the bank had issued of the letter "B" above the number "1401," and of the letter "C" to an amount of about $145,000 and put them into circulation.

Defendant admitted that $100 of the bills sued upon was free from any of the objections as being issued for war purposes.

The plaintiff having denied that he was informed of the "war issues" by the cashier as above stated, the counsel of the defendant asked his Honor to instruct the jury—their characters for veracity being in every respect equal—that the positive statement of the witness, Caldwell, was entitled to the greater weight. His Honor declining to give such instruction, defendant again excepted.

For the defendant, it was further asked of the Court to instruct the jury that the issue by the bank to pay for State bonds issued as aforesaid was in aid of the war. Instruction declined, and defendant again excepted.

The case being submitted to the jury, after being some time out they were recalled and charged by his Honor that they had nothing to do but respond to the issues, and (195) that it was not a matter for their consideration how a decision, either one way or another, would affect the parties. That he intended to say this in his first charge, but from oversight omitted it.

The jury again retired, and after awhile returned the following verdict in writing:

"We find, first, that one-third of the notes were issued by the defendant to loan to the State in aid of the rebellion.

"Second, that the plaintiff had no knowledge of the fact that they had been so loaned at the time he purchased them."

This verdict the Court refused to accept, explaining to the jury its indefiniteness as to which of the bills and how many were included in the third they found; that he should set a verdict in that shape aside and grant a new trial. To this the plaintiff excepted. His Honor then repeated his previous charge, that the effect of their decision upon the parties was not a matter for their consideration; that there were grave questions of law to be decided after their verdict was rendered which would probably require two courts to dispose of; and unless they could select of the $200 in bills delivered to them the particular notes issued in aid of the rebellion, they should find the first issue in the negative. Defendant again excepted.

His Honor further instructed the jury that if the notes, or any of them were issued in aid of the rebellion, and the plaintiff had no notice of it at the time of his purchase, it did not affect his right to recover. Again defendant excepted.

The jury returned their verdict as hereinbefore stated, to-wit, finding each of the two issues in the negative. Upon being polled, one of their number said that "he was satisfied that part of the notes were issued in aid of the rebellion, but not being able to point out the particular bills under the charge of the Court, he concurred in the verdict."

Defendant moved the Court to set aside the verdict and grant a new trial. Motion refused. Judgment in accordance with the finding of the jury. Defendant appealed.

(196) *William A and J. W. Graham* and *Scales & Scales,* for appellant, filed the following brief:

The defendant submits that the judgment below should be reversed:

1. For refusal to consolidate this with twenty-seven other cases, on demands of the same nature, between the same parties. It was the duty of the Judge to have allowed this motion. 1 Chitty Pl., 199, 200; *Person v. Bank,* 11 N. C., 294; *Buie v. Kelly,* 52 N. C., 266.

2. For refusal of the instructions relative to the superior credibility of Caldwell over Shaw, the plaintiff.

3. Refusal of instructions prayed, that the issue of notes in purchase of State bonds issued for war purposes rendered the contract to pay them void, and this irrespective of notice to the plaintiff. *Kingsbury v. Gooch,* 64 N. C., 528.

4. For refusal to record the verdict of the jury, which was clear and intelligible and responsive to the issues submitted. *State v. Arrington,* 7 N. C., 571. When a jury returns an insensible or informal verdict, or one not responsive to the issues submitted, they may be directed by the Court to reconsider it, but not otherwise. *Ibid.* (a) This was accompanied by a threat that the Judge would set it aside and grant a new trial if it were so entered; and (b) the remark that unless they could point out the particular bills issued in aid of the war, they should find for the plaintiff; (c) and the further remark that they had nothing to do with the result of the cause, whether it would be unfortunate for the one side or the

other, and that it would probably take two courts to decide it after the verdict was rendered, there being still grave and difficult questions to be determined—all this tending to influence the verdict of the jury on the facts, and the response of one of the jury, when polled, showing that this interference was conclusive with him.

5. For error in overruling the defense set up in the pleadings, that the acts of the Legislature and ordinances of the Convention of North Carolina was an exoneration of the defendant from its obligation to redeem said notes. (197) This opens a wide field for consideration, and should not be decided without thorough investigation.

1. The laws and ordinances of the State were intended clearly to exonerate the bank from payment, at least until the State repaid her loans from the bank. Can they be allowed to have that effect? The charter of this bank was a contract between the State and the corporation, which was of inviolable obligation on both sides, except by agreement of the contracting parties, and by such agreement it is capable of any change or modification.

2. Even without such agreement, so far as pertains to public objects, the Legislature may alter at its pleasure. Thus an act to change the location of the court-house in a county is within the competency of the Legislature, although a contract had been made by commissioners appointed by law for the purchase of a particular site for such building. *State v. Jones,* 31 N. C., 38, 414. And it is a settled construction of the Constitution of the United States that no limitations contained in that instrument upon the powers of government extend to embrace the different States, unless they be mentioned or it is expressed so to be intended. *State v. Newsom,* 27 N. C., 250.

3. Incorporated banks of issue, such as this, are not mere private institutions, but are established in great part for public ends and are liable to be modified or regulated in many respects by legislative considerations of the public interest. (a) Thus, the Bank of England was incorporated in 1693, with a capital of £500,000, and was designed to aid the government by loans in the great financial embarrassments occasioned by the wars consequent on the expulsion of the Stuarts and the security of the English Constitution under William

III. (1 Smollet His. Eng., chap. 4, sec. 35), a purpose in which it was eminently useful. A century later, in 1797, to maintain the stupendous war which England was maintaining against Napoleon I., the government directed by (198) act of Parliament a suspension of specie payment by the bank—a measure which was continued under sundry acts till 1821.

(b) In like manner the Bank of North America, under the lead of Robert Morris, was established and found highly beneficial in the latter years of the War of the Revolution as a fiscal agent of the Union.

(c) The chartering of the Bank of the United States in 1791, and re-charter in 1816, was a contested measure on constitutional grounds and was carried and sustained expressly upon the ground that it was necessary, in the constitutional meaning of the word, for the collection, safe-keeping and disbursement of the public moneys, including the commission of loans by the government.

(d) The banks of North Carolina, at least since a serious failure in the Treasury in 1826, have been required to be used as agents of the public fisc, and have usually been chartered, like the one before us, with a stipulation to make loans to the State.

4. The legislative authority of the State, as of the United States, is the sole judge of what is for the interest of the public in relation to finance, currency and banking within its own sphere, and at least with the consent of a banking corporation, may adopt such changes of policy in relation to the operations of such bank as may be deemed expedient, even to a repeal of its charter. Ang. and Ames, sec. 772, p. 878. The contract with the note-holder to redeem his paper is subordinate to the great objects of State which may necessitate those changes, and if, by reason of them, he suffers, he may seek his redress in a claim against the State, it being known before he received such paper that such changes as authorized suspensions are incident to banks of issue. It is no breach of contract with him to suspend, and he is not within the protection of the article in the Constitution of the United States as to "impairing the obligation of contracts."

5. Every citizen is presumed to have notice of the public acts of the State Legislature and of Congress, and the plain-

tiff in this case is shown to have acquired these notes (199) long subsequent to the suspension of 1860 and the ordinances proclaiming that no redemption should ever be required until the State should repay the loans had by her from the bank. However it may have been with an innocent holder of such notes, for value, who acquired them before these acts and ordinances, and continued to hold, the plaintiff occupies no such position; the bank had no contract with him at or before the time when the State announced that no further redemption should be required, and therefore none that could be impaired in its obligations. On the contrary, he occupies the place of an adventurer and speculator, and has to overcome the maxim, *"Nemo debet locupletari ex aliena jactura."*

6. Every one who received the paper of this bank after the promulgation of the acts and ordinances of suspension took it at his own risk, as the notes of the Bank of England were taken from 1797 to 1821—and such, I learn, has been the decision in a similar case by a circuit Judge in South Carolina.

7. Let it not be overlooked that the plaintiff has no advantage over the defendant in loyalty to the United States in the recent war. Both took their chances with the Confederate States.

8. It is a matter of public history that the object of all the acts in the Legislature and ordinances aforesaid was to cause this bank to issue its notes to aid the war against the United States; therefore all its issues after November, 1860, are void as the contract sued on. *Evans v. Richmond; Texas v. White, Chiles et al.,* U. S. C., Wallace.

9. But the United States destroyed the bank by an act of Congress taking it out of existence. This was equal in its effect to a calamity caused by the act of God or a public enemy. *Weith v. Wilmington,* 68 N. C., 24, last clause of opinion.

Plaintiff was not a holder until 1871, and must have known the history of the loans during the war. The repeal in 1860 of the requirement to pay specie was no violation of any contract with him.

(200) *Dillard, Gilmer & Smith* and *L. M. Scott, contra,* submitted the following:

Action is founded on bills of the bank, altogether of 5's and 10's and of letters A, B, C, to the amount of $200. The A's are ante-war; B's above 1401 are *war issues* up to 5,000; all under and over are admittedly current and legal, and all of C are *war issues.*

This action and all the others are each for $200, composed of bills of the several letters and of different numbers—some within and some without the alleged illegal limit.

First Exception: On the motion to consolidate, the Judge was not in error. It is wholly in the discretion of the Court.

1. *Smith v. Bowell,* 4 N. C., 633. The warrants were sixteen in number—fifteen for $4 and one for $1, on bills of defendant ranging from 2½ cents—consolidation refused in part for the reason the plaintiff was less vigorous than he might have been and favor to the defendant in his larger right of stay of execution.

2. *Pearson v. Bank,* 11 N. C., 294. Warrants on twenty-one bills, twenty-one in number, making in all $104. Consolidation allowed, defendant waiving a plea in abatement and agreeing to pay the costs of clerk and constable. The Court decided it was discretionary, "and the causes of action being the same, and great improbability of different defenses, the Court would not disturb the consolidation."

3. In *Buie v. Kelly,* 52 N. C., 266, it was ruled, adopting and assenting to *Thompson v. Shepherd,* 9 Johnson, 262, "that consolidation *might* be allowed when the notes were *made at the same time* and might have been *united in the same action,* and when the *defense is the same,* and a reason is given, viz., that it may avoid *oppression.*

In our actions the notes are of different *dates*, different *letters*—some free from objection and some not; some within and some without the limit of war issues; some subject to alleged illegality and some not; and all the alleged illegal issues subject to the question whether the holder had (201) notice of, or was mixed up in, the illegality, and if so, to what extent and as to which of the bills.

Quere: If Superior Court can consolidate, the justice's court might, and the actions being each for $200, the justice could not consolidate, or if he did he would have ousted his jurisdiction. Can or ought the appellate court to do that which the lower court could not have done?

If Superior Court compellable to consolidate, and one-third of bills on final judgment is refused as illegal, one bill in one parcel, two in another, and so on, how will a general trial and judgment in the Superior Court with its *precedents* enable the justice to distribute the excluded bills in the several separate judgments remaining in his court in full form? We observe that an appeal from a justice's court leaves the judgment then in full force. See C. C. P., sec. 541.

We say, then, there was no error in refusing to consolidate.

Second Exception: There was no error in refusing defendant's motion to overrule what he calls a demurrer to the answer. The reply was not a demurrer, for it contained an averment of receiving the bills of the bank in the course of business, for value and without notice of illegality, which were matters of fact to the jury, and an issue was in fact submitted on that point.

Third Exception: There was no error in the refusal to charge that Caldwell was entitled to more evidence than Shaw as to the question of notice, each being equally positive, one of a negative, the other of an affirmative.

Fourth Exception: Upon the question of illegality of notes issued:

1. Bank notes payable to bearer and on demand at a place named are in honor until demand and refusal. *Bank v. Bank,* 35 N. C., 75; *Crawford v. Bank,* 61 N. C., 136.

2. Between the bank and the person first borrowing, the bills may be void for being issued against allegiance of the bank to the United States, but as to all others acquiring them in the course of circulation and for value, (202) they are free from objection. See argument of the Court in *Weith v. Wilmington,* 68 N. C., 24.

3. If illegality is apparent on face, then void throughout the round of circulation. *Cronly v. Hall,* 67 N. C., 9.

There was nothing in the face of these notes indicating illegality, and the cashier testified "*that the dates* of the notes were of no importance as a criterion or guide in distinguishing" the war issues, and he himself could not distinguish them except by reference to his books, etc.

4. The notes, therefore, being payable to bearer in the

usual form, and no illegality expressed or suggested on their face, the defense of illegality is not tenable as against the plaintiff, who got them in the usual course of business, for value and without any notice of taint. *Baucom v. Smith,* 66 N. C., 537.

5. What is the effect of acts suspending specie payments? Merely a dispensation of forfeiture by the sovereign, leaving the banks, like any other person, liable to the legal remedies of the holders. If it did more it would avoid and impair the contract and be null and void.

The jury on the issues find:

1. That plaintiff got the notes in the usual course of business and for value.

2. That plaintiff had no notice of any illegality in the issue of the notes.

And on these findings we submit the plaintiff is entitled to recover.

Fifth Exception: The Judge committed no error in sending the jury back to find and render an intelligent verdict, and one responsive to the issues submitted. *Houston v. Potts,* 65 N. C., 41; *Crews v. Crews,* 64 N. C., 536.

RODMAN, J. We will consider the exceptions of the defendant successively:

1. That the Judge refused to consolidate the several actions of the plaintiff against the defendant. We are inclined to think that no appeal will lie from such a (203) refusal, as apparently it does not affect any substantial right of the defendant. C. C. P., sec. 299. Expressing no opinion on this, we think the refusal of the Judge was right. It did not appear that the bills sued on in the several actions were all of the same character and issued under the same circumstances, so that the defenses would be the same to all. *Buie v. Kelly,* 52 N. C., 266, sustains this view.

2. Caldwell, an officer of the defendant bank, swore that he had informed the plaintiff before he bought the bills sued on that there was a certain class of the bills which had been issued in aid of the rebellion, and informed him how he might possibly distinguish them from those issued before the war. The plaintiff swore that Caldwell had not given him such information. The defendant requested the Judge to

instruct the jury that, the characters of the two witnesses being equal, they should give more credit to the positive than to the negative statement. The Judge refused. It has been said in some text-books, or perhaps in some judicial *dicta,* that if one witness swears affirmatively that he saw or heard a certain thing, and another that he did not see or hear it, although present and able to have seen or heard it, had it occurred *ceteris paribus,* belief should be given more readily to the affirmative statement, for perhaps the negative witness may not have had his attention excited at the time. But this, like the rule, *"falsum in uno, falsum in omnibus,"* is merely an aid to the judgment of the jury, and not a rule of law to be laid down by the Court. And whatever weight it may have in its proper place, it can have none here. The conversation testified to was between the two witnesses alone, and each had his attention called to it. The difference in their statements can arise only from a want of truth or a want of memory in one of them. Their respective credibility is not to be tested by any arbitrary rule, but by considerations which it is peculiarly for the jury to weigh; for example, the interests or feelings they respectively had in the result of the action, and even from their demeanor on testifying.

We think, for this reason, that the Judge committed (204) no error in refusing the instruction. There is another reason, viz., that it was immaterial whether the plaintiff had notice before his purchase or not. That question will be considered under the next exception.

3. The refusal to instruct the jury that if the bills in question were issued to the State or to the county of Guilford in exchange for State or county bonds, with the knowledge that the bills were to be used in aid of the rebellion, and they were actually so used, they were void, and plaintiff could not recover.

The Judge told the jury that if the bills were issued in aid of the rebellion, yet if the plaintiff purchased them for value and without notice of the illegal purpose, he could recover.

We understand the Judge as saying that if the plaintiff had notice of the supposed illegality before his purchase he could not recover. The jury do not distinctly find whether the plaintiff had such notice or not. It would seem that they thought he had a certain sort of notice, but that they found for him because the information which he received did not enable him to ascertain what particular bills were affected with the supposed illegality. If this was the character of the notice, inasmuch as the burden of proof is on the party alleging the affirmation of notice, such an uncertain notice would be equivalent to none at all. Passing that by, however, and assuming that the notice to the plaintiff was full, then two questions are to be considered:

1. Whether the plaintiff (notwithstanding such notice) is to be regarded as an innocent holder.

On this point: The bills were issued under illegal contracts with the rebel government of the State and of the county. As between the original parties they were void. But it does not certainly appear that all of them were issued directly to the State or county. Some of them (it is uncertain which) were issued to individuals innocent of any guilty knowledge, and in the ordinary course of business. They, or some of (205) them, were antedated (not with any fraudulent intent) so as to appear issued before secession. They bore on the face no indication by which the public could know that they were issued upon an illegal loan or otherwise than in the usual course of business. The officers of the bank could tell from its books that a large number of the bills lettered B, and all lettered C, were issued upon the illegal contract, but the public had no means of knowing this. They were intended to circulate as money, and in the absence of all evidence to the contrary, it must be presumed that they did so circulate to the end of the war. It must also be presumed as a natural and necessary result, in the absence of all evidence to the contrary, that in the course of transmission from hand to hand in the ordinary course of business they passed to and through at least one innocent holder. That being so, the plaintiff, although he himself had notice before purchase, succeeded to the rights of such innocent holder, and stands in his place. As respects lands, this doctrine is familiar. Rev. Code, chap. 50, sec. 4; Bump. Fraud. Con., 481. And the same principle of equity extends to bills and notes. 1 Parson's Bills and Notes, 216; *Masters v. Ibberson*, 8 Man. Gran. & L., 100 (65 E. C. L. R.).

If it were otherwise, an innocent holder of land or bills who received notice of the fraud or illegality after his purchase could never sell the property, for, having notice, he would be bound in honesty to communicate it. He would thus be tied up to an inalienable estate. The rule is that he can sell his own estate such as he holds it. On proof by plaintiff of a purchase by him, for value, the burden of proof of notice not only to him, but to all antecedent holders, is on the defendant. *Masters v. Ibberson, supra.*

Our conclusion that the plaintiff is, or represents, an innocent holder brings us to the second question:

2. Whether or not the bills were void in the hands of such holder by reason of the illegality of their original issue.

It is contended that they are like notes vitiated by an usurious or a gaming consideration which cannot be enforced in the most innocent hands but are always (206) and under all circumstances void. That is the admitted law with respect to such contracts. But the cases which so hold do it expressly on the ground that a statute declares such contracts void, and unless full force be given to the mandate, the statutes would be constantly evaded.

In the present case there is no statute making these bills void. By the common law they were void between the parties to the illegal contract, viz., the State and the bank. But the taint does not follow them into innocent hands. The interests of commerce require the rule that in such a case a party may transfer a better title than he possesses.

The question as to the validity of illegal notes in the hands of innocent holders was so fully considered in *Weith v. Wilmington,* 68 N. C., 24, that we deem any further discussion unnecessary now. In that case it was held that the plaintiff was not entitled to recover; but the decision was expressly put upon the ground that the ordinance of 1868 had forbidden municipalities to pay debts incurred in aid of the rebellion. These acts were construed as if they had declared all contracts to pay such debts void, thus bringing them within the rule which it is settled applies to usurious and gaming contracts.

The rule to be extracted from the decisions we consider to be this: If a statute declares a security void, it is void in whosoever's hands it may come. If, however, a negotiable security be founded on an illegal consideration (and it is immaterial whether it be illegal at common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder or of any one claiming through such a holder.

The case of *Hay v. Ayling,* 16 Ad. & Ellis, 423 (71 E. C. L. R.), is a notable illustration of the difference. Gaming securities were declared *void* by 9 Anne, chap. 14, sec. 1, and it was held that they were void in the hands of a *bona fide* innocent endorsee. The Act of 5 and 6 W. 4, chap. (207) 41, sec. 1, modified the Act of Anne, and declared they should be *illegal.* The Court held that after that act they could be recovered on by an innocent holder. See *Masters v. Iberson, ante.*

6. The refusal of the Judge to instruct the jury that by reason of the ordinance and acts of Assembly cited in the answer the bank was exonerated from the payment of these bills.

Whatever may have been wisely and justly done by governments of unlimited powers, it cannot be an authority to us. This State, during the rebellion, was not the less subject to the Constitution of the United States than it was before. Though the Constitution was practically powerless during the war, yet upon its termination it is deemed by a sort of *jus post limine* to have been continuously in force, and must be so held to have been by our Courts.

Whatever the intention of the acts cited may have been, the only effect which can be constitutionally allowed them is to exonerate the banks from the forfeiture of their charters and other penalties under the laws of the State. They cannot have the effect to discharge the banks from their liabilities to innocent holders of their bills. That clause of the Constitution which forbids a State to impair the obligation of contracts is too familiar to need a more special reference.

Neither can we consider it a defense to this action that Congress practically deprived the bank of its most valuable franchise, the issue of bills. We are not called on to say whether the act of Congress was either just or constitutional. Our opinion on such a question would be entitled to but little weight. But, supposing it to be neither one or the other, it furnishes no defense to this action. If one is lawlessly plundered of all his property by a robber, he is still bound for his debts, at least to those who had no part in the robbery.

Our opinion on these exceptions renders it unnecessary to consider the fourth exception.

PER CURIAM. Judgment affirmed.

Cited: Glenn v. Bank, 80 N. C., 97; *Long. v. Bank,* 81 N. C., 49; *Morrison v. Baker, Ib.,* 80; *Ward v. Sugg,* 113 N. C., 490.

(208)

S. B. ALEXANDER v. THE COMMISSIONERS OF McDOWELL COUNTY.

1. Bonds issued and signed by the last chairman of the County Court, after the adoption of the present Constitution abolishing that Court, in payment of the county's subscription to the capital stock of a railroad company made by a former chairman according to law, which bonds were countersigned by the Clerk of that Court and sealed with the county seal and accepted by the president of the road in payment of the county subscription, are proper subjects of ratification, and when such bonds are ratified they are valid.

2. When it is omitted in the act authorizing a county to issue bonds to pay its subscription to a railroad by whom the bonds are to be signed and issued, a succeeding Legislature has the power to amend the act in this particular, *nunc pro tunc,* and thus render valid the action of those who issued the bonds without express authority.

CIVIL ACTION (to recover the amount of certain coupons, and for a peremptory *mandamus, etc.*), tried before *Moore, Judge,* July (Special) Term, 1873, of MECKLENBURG Superior Court, upon the following case agreed:

1. The County Court of McDowell County was abolished 15 July, 1868; and its powers and duties were thereupon devolved upon the county commissioners.

2. That a portion of the paper writings (which are herein for convenience, styled bonds) were signed by J. S. Brown, who was the last chairman of the County Court before its abolition, in vacation and without any order to that effect from the County Court to the amount of $12,500, and the remainder, to-wit, to the amount of $37,500, were signed by him after the abolition of the County Court; and all of them, amounting to $50,000, were countersigned by the clerk, A. M. Finley, and the seal of the Court impressed upon them after the abolition thereof; and all of the paper writings (herein for convenience styled coupons) now sued on, except

one, were attached to the latter class of bonds and signed by said Finley, when he countersigned the latter class of (209) bonds.

3. That no certificate of stock was ever issued to the County of McDowell, or to any one on its behalf, but said county was credited on the books of the Western North Carolina Railroad Company with $50,000 worth of stock, and was treated and recognized in all respects by the company as a stockholder.

4. That at the annual meetings of the stockholders held in the years 1869 and 1870, the said county was represented as the owner of said stock by one A. M. Erwin, duly authorized by said board of commissioners as its agent or proxy, and that during the years 1870 and 1871, said county was represented in the annual meetings of said stockholders by one A. G. Halyburton, the duly authorized agent or porxy, and that at each of said meetings, the said county, through its said proxies or agents, exercised all of the rights of a stockholder in said company.

5. That the board of commissioners holding office from 1868 to 1870 refused to levy any tax to meet the interest on said bonds. That the board of commissioners holding office from 1870 to 1872, did levy a tax on 10 February, 1871, of 90 cents on the $100 valuation; and again on 20 April, 1872, another tax. That the present board of commissioners, the defendants, have laid no tax, appointed no proxy and have always refused to recognize the validity of the said bonds. That the board secondly above named, at the time of the levying of the taxes as above stated, were not aware of the manner in which the bonds were signed (except such constructive notice as the law may imply from the records of the County Court, as set forth in the answer), and supposed them to be regular and binding until the facts were ascertained as above stated and they were advised by counsel to the contrary. Since then they laid no tax, paid no coupons, nor have they or the county been represented in the stockholders' meetings of said company.

6. That the said board secondly above named, to-wit, from September, 1870, to 1872, with the proceeds of the tax (210) paid by them and before the facts were ascertained and they were advised as above stated, paid a large

number of the interest coupons attached to said bonds, to which the coupons upon which this action is brought were also attached.

7. The act of the General Assembly ratified 1 March, 1870, chap. 65, Laws of 1869-'70, purporting to cure all irregularities in the issuing of said bonds, is to be treated as sufficiently pleaded. (The provisions of said act are fully stated in the opinion of the *Chief Justice*).

8. The plaintiff is a *bona fide* purchaser without notice of the alleged defect.

9. The action of the County Court touching the matter as stated in the answer is correct, and it is to be treated as part of the case agreed. (Also fully set out in the opinion of the Court.)

10. That a demand for payment and for the levy of taxes has been made, and no part of the coupons sued on has been paid.

11. That the appointment of proxies, the levy of taxes, the payment of coupons and passage of the act of Assembly, all as aforesaid, occurred after said bonds were signed and before the commencement of this action.

12. That the said bonds purport on their face to be issued pursuant to an act of the General Assembly, entitled "An act to amend the charter of the Western North Carolina Railroad Company;" and they likewise purport on their face to be payable to the "Western North Carolina Railroad Company, or the holder."

13. That all of the coupons sued on were attached to and detached from the latter class of bonds ($37,500) except one.

If upon the foregoing case agreed the Court shall be of opinion with the plaintiff, judgment for a peremptory writ of *mandamus* shall be rendered; if his Honor be of opinion with the defendant, a judgment of non-suit.

Upon consideration, the Court being of opinion that the plaintiff was entitled to relief demanded gave (211) judgment accordingly, from which judgment defendants appealed.

McCorkle & Bailey and *Folk, Gaither & Bynum* for defendants.

Jones & Johnston, contra.

PEARSON, C. J. Without allowing ourselves to be (230) confused by the multitude of cases cited on both sides of the question, and taking a common sense view of it, we are satisfied that the decision of his Honor in the Court below is in accordance with law.

A mere statement of the case would seem to be sufficient to justify this conclusion. By the Act of 1857, the Justices of the Court of Pleas and Quarter Sessions for the county of McDowell are empowered to take stock in the Western North Carolina Railroad Company (which passes through the county), *provided* a majority of the votes of the county be given in favor of a subscription for some specific amount. At an election duly held a subscription of $50,000 was authorized, (231) and in pursuance thereof the Justices, by their chairman, William Murphy, subscribed for $50,000 of stock.

No order was made in regard to the issuing of the bonds required to pay the county subscription, and that matter was left "for furthe directions" until the company organized and began operations. So far all is regular. The county is the owner of $50,000 of stock and owes that sum to the company, to be discharged by county bonds, which it was the duty of the Justices to issue.

By the change of our system, the Court of Pleas and Quarter Sessions is abolished and the government of the county is vested in commissioners. Very soon after this change, Mr. Brown, who was the chairman of the Court of Pleas and Quarter Sessions at the time of the change, executed the bonds in controversy and affixed the seal of the county, and the bonds were countersigned by A. M. Finley, the Clerk of the Court. These bonds were delivered to the president of the company, and accepted by him in discharge of the county subscription. By the action of Murphy, chairman, the county became the owner of the stock, the only question left open was the mode and manner of signing the county bonds.

Brown, chairman, and Finley, clerk, execute the bonds in the name of the county and affix the seal of the county. The bonds are accepted by the company in payment of "the McDowell county subscription."

Assume that these bonds were of no force, for the reason that the Justices of the Court of Pleas and Quarter Sessions had omitted to make an order that their chairman execute bonds to be countersigned by the clerk, which bonds it was the duty of the Justices to cause to be executed; and that by reason of such omission of duty, Thompson and Finley had no authority to execute the bonds, we have the question of ratification.

1. Were these bonds a subject of ratification?

On the argument much was said about the distinction between "voidable" and "void," and the position was taken by the counsel for the defendant that these (232) bonds, being *void,* could not be ratified. According to the cases, a void estate cannot be confirmed or ratified (the two words being used in the same sense) for the plain reason that there is nothing to be confirmed or ratified. For instance, a tenant for life makes a lease for years. The remainderman or reversioner may confirm the term during the continuance of the life estate, but after the termination of the life estate, the term cannot be confirmed, for it is void, and there is no estate to be confirmed; so, if a lease for years be made to be void on non-payment of rent, after forfeiture it cannot be confirmed, for there is no estate to be confirmed. See Bac. Abrid., Leases and Terms for Years. To avoid this consequence, conveyancers instead of drafting the lease so as to make it *void* on non-payment of rent adopted the form "in case the rent is not paid," etc., the lessor may enter and avoid the term, thus giving him the right to waive the forfeiture and let the term continue, upon compensation being made.

But this learning has no application to our case, for here we have certain papers purporting to be county bonds, and there is *a thing in existence,* although it be of no force or legal effect unless it be confirmed or ratified so as to give it force and legal effect. We can see no principle upon which that may not be done. A wife, having no separate estate, without the assent of her husband buys a carriage and pair of horses on his credit. The contract is void, that is, it has no force or legal effect, but it is a subject for confirmation. If the husband allows his wife to use the carriage and horses there is an implied ratification, and he is bound to pay the price agreed on because he recognizes the action of the wife as agent for him.

So A sells a tract of land owned by B, receives the purchase money, executes a deed in the name of B, and signs the name of B *"by A his attorney."* This deed is void in one sense of the word, that is, it has no force or legal effect, but still it is a *thing existent,* and if B elects to ratify the sale and executes *a deed* ratifying the action of A in as full and ample manner as if he had empowered him before the date (233) of the sale to sell and convey the land, can any reason be suggested why this deed, being registered, does not ratify the deed executed by A in as full and ample a manner as if there had been a power of attorney previously executed? No objection to the effect of a deed of ratification arises to us, and we are of the opinion that the deed executed by A, as the agent of B, would take effect under the maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*—every ratification relates back and equals a covenant. The principle is, he who can command may ratify.

So had the Justices or the commissioners who succeeded them caused a resolution to be entered upon their journal to the effect that the action of Brown and Finley in respect to the county bonds was ratified, so as to make the bonds valid and binding upon the county, the resolution would have taken effect, and indeed, it would have amounted to an amendment, *nunc pro tunc,* the doing of that afterwards which ought to have been done before, for as the county had made the subscription and become owner of the stock, it was the duty of the county authorities to have the bonds issued in payment.

Whether the fact that the county authoritites represented this stock at several meetings of the stockholders, and levied taxes one or two years to pay the interest on the bonds has the effect of an *implied* ratification is a question into which it is not necessary for us to enter. We will merely remark, a ratification must be in a manner as solemn as that required for the command; and we will further remark, there can be no doubt that the county is bound to pay for its stock. If these bonds by the county authorities, we put our decision upon the railroad company, have an action of *mandamus* to compel payment of the county subscription, the fund to be divided among the bondholders. *Cui bono?* Are not the county authorities fighting for nothing? The debt of the county has to be paid.

2. Waiving the question of an implied ratification of these

bonds by the county authorities, we put our decision upon the effect of the statute of 1 March, 1870. That act, in so many words, ratifies the county bonds executed by (234) Brown, and the only remaining question is as to the power of the General Assembly to make such ratification.

3. The power of the General Assembly is denied, upon the ground that the ratification was a *judicial,* and not a legislative act; it was for *the county* to decide whether these bonds were valid or not.

The General Asembly, by the statute referred to, does not undertake to *decide* that these bonds are valid, but it does undertake to give validity to those bonds by aiding the omission of the Justices in respect to the order that Brown, chairman, and Finley, clerk, execute the bonds, and for this purpose adds to and amends the act of 1859, by enacting "after the vote is taken and the stock is subscribed" John L. Brown and A. M. Finley be authorized to execute bonds for the amount and affix the seal of the county, and the bonds so executed shall be valid." Clearly, the General Assembly had power to make this "command" in the Act of 1859. Why did it not have power in 1870 to amend the Act of 1859 by expressly naming the parties who were to act as agents of the county in executing the bonds, whereby to satisfy and give effect to the county bonds? This is *legislation* made necessary to supply an omission on the part of the Justices to make an entry that their chairman, Brown, and the clerk, Finley, should execute the bonds for the county. In passing this act *nunc pro tunc,* the General Assembly ratify what ought to have been done in carrying out the provisions of the Act of 1859, but it does neither more nor less than it had power to have done in 1859, and what it is presumed it would have done had this objection to the manner of the execution of the bonds been anticipated. For the execution of the bonds in payment of the county subscription was a plain duty imposed upon the Justices of the county of McDowell. *Campbell v. Kenosha,* 5 Wall., 194, and the cases cited under the head of "Retroactive Statutes."

No error.

PER CURIAM. Judgment affirmed.

Cited: Tatom v. White, 95 N. C., 457; *Lowe v. Harris,* 112 N. C., 492.

(235)

STATE v. R. P. ROSEMAN and BOYDEN TREXLER.

To an indictment for injuring a public school-house, the defendants, for a defense, set up a claim in a third person to the house alleged to be injured, and justified under the permission of such claimant to commit the acts complained of: *Held*, that the charge of the Judge below, "if the jury believed the defendants honestly were of the belief that the house was the property of" such claimant, "and he had a right to give it to them, they were not guilty, but if the defendants did the acts complained of, willing to run the risk of a suit, or careless whether they had a right or not, that would not protect them—they would be guilty, or if they did the acts solely relying upon the promise of such claimant to protect them, they would be guilty," was as favorable as the defendants could ask, and was no good ground for a new trial.

INDICTMENT (for injury to a public school-house), tried at the August (Special) Term, 1873, of ROWAN Superior Court, before *Albertson, Judge.*

The defndants were charged with demolishing a public school-house belonging to the school committee of the township. The defense was that the house belonged to one Tobias Kesler, and that in the injury committed they were acting under Kesler's orders.

A deed dated 27 November, 1848, from Tobias Kesler, to the school committee of the 38th school-district of the County of Rowan, and their successors in office, conveying the house alleged in this indictment to have been demolished, was read, after objection by the defendants on the ground that it had never been properly proved. (The handwriting of the subscribing witness, he being dead, was proved, and upon that proof the deed ordered by the Judge of Probate to be registered.) The State read the deed as evidence of a dedication of the house to the public. Defendants excepted.

For the State it was also proved that the defendant, Roseman, with a colored man, was seen tearing down the chimney of the house, and upon being asked if he was going to "tear down our school-house," replied, "Yes, in part; that (236) Tobias Kesler had given him permission to take the brick," etc., and that Kesler would "stand between him and danger"; that the colored man said he would have nothing to do with it, if he was going to get into trouble about it, when Roseman told him that he, Roseman, would stand between him and harm.

It was also in evidence that the school-house had been continuously occupied, with the exception of two months during the year, by teachers of free schools and subscription schools, under the direction of the school committee. That since the war a subscription school was made up and some one went to Tobias Kesler's for the key, who refused at the time to give it up, giving as a reason that a "red string" should not occupy the house. He did not claim the property. Other witnesses testified to the injury to the house by defendants, and that it had been used for public school purposes under the direction of the committee. Some of them testified that Jacob Kesler claimed the house from the time free schools stopped.

One of the school committee up to 1870-'71, had furnished locks to the door, and under the present township system had exercised ownership and direction of the house, and it had never been disputed.

For the defendants it was shown that Kesler claimed the house after the former system of common schools went down, and now and then exercised over it ownership by locking it up, and that, acting under the advice of counsel, he refused applicants using the house and gave permission to defendants to take away the bricks, etc., telling them he would stand between them and danger.

The defendants requested his Honor to charge the jury:

1. That if they believed the defendants pulled down the house under the authority given by Tobias Kesler, and that Kesler had title thereto, the defendants would not be guilty, however defective such title might turn out to be.

2. That defendants were not required to know in whom the legal title to the house was, if they tore it down under the honest belief that it was the property of Tobias Kesler

3. That if the jury are satisfied that Tobias Kes- (237) ler's claim was *bona fide* and was communicated to the defendants, in committing the trespass in assertion of such claim they would not be guilty, and the jury ought to acquit, notwithstanding Kesler's claim had no foundation in law.

4. That if the jury were satisfied that Kesler had possession and defendants acted by his orders, they would not be guilty.

The Court charged the jury that it was the duty of the defendants to inquire into the title to the property before injuring it as they did; that the fact of the deed not being registered until after the acts complained of and the taking advice of counsel by Kesler and the knowledge of the defendants thereof as to the proper construction of the deed is left to the jury, as touching the *bona fides* of defendants in committing the trespass complained of.

That if the jury believe the defendants were honestly of the opinion that the house was the property of Kesler and that he, Kesler, had a right to grant them permission to tear it down, they would not be guilty; but if the defendants did the acts complained of, willing to run the risk of a suit, or careless whether they had a right or not, then that would not protect them, and they would be guilty; or if they committed the offense relying upon Kesler to stand between them and harm, they would be guilty. That the facts established did not constitute in law such a possession of the house by Kesler as would justify the acts of the defendants. That the recital in the deed conveying to the "School Committee" could not be traversed by defendants justifying under Kesler, who made it.

Defendants were convicted. Judgment and appeal.

McCorkle & Bailey, for defendants.
Attorney-General Hargrove, for the State.

SETTLE, J. This indictment charging the defendants with the offense of injuring a public school-house was before this Court on a former occasion, and is reported in 66 N. C., 634. (238)

School Committee v. Kesler, 67 N. C., 443, was a civil action to recover damages for the injuries complained of in this indictment.

A reference to those cases renders it unnecessary to state the facts, or to do more than briefly notice the points made upon the argument made at this term.

We think the rulings of his Honor on all the points presented were fully as favorable to the defendants as they could ask.

Passing by the objection to the evidence, which we think was clearly competent, his Honor instructed the jury that "if they believed that the defendants honestly were of the belief that the house was the property of Kesler, and he had the right to give it to them, they were not guilty; but if they did the acts complained of, willing to run the risk of a suit or careless whether they had a right or not, that would not protect them, and they would be guilty; or if they did the acts solely relying upon the promise of Kesler to protect them, they would be guilty."

The jury found them guilty, and we think upon the evidence which is reported and made a part of the case for this Court that they were well warranted in so doing.

The evidence shows that they had discussed the danger of a prosecution, and that Roseman said while tearing down the chimney that Tobias Kesler "would stand between him and danger," and when the colored man, who was with him, said he would not do anything if he was to get into trouble, Roseman replied that "he would stand between him and trouble."

It is evident, as the jury found, that they were taking the risk of violating the law, relying upon the indemnity given by Tobias Kesler to stand between them and danger.

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

(239)

STATE v. ALLEN McPHERSON and HENRY WILLIAMS.

A defendant cannot be convicted of that with which he is not charged. *Therefore,* where the Judge below, upon the trial of an indictment charging the defendant with breaking and entering into the house of the prosecutor and stealing therefrom, charged the jury "that if they believed the defendants (however they may have got into the house) broke out of it, they were guilty": *It was held* to be error and to entitle the defendants to a new trial.

INDICTMENT for burglary, tried January Term, 1874, of the Superior Court of WAKE, before *Watts, Judge.*

The facts are stated in the opinion of *Justice Reade.*

Defendants were convicted and appealed to this Court.

Purnell and *J. C. L. Harris,* for defendants.

Attorney-General Hargrove, for the State.

READE, J. Burglary at common law was the breaking and entering a dwelling-house, in the night time, with intent to commit a felony. It was necessary to charge in the indictment *fregit et intravit*—" broke and entered." And so are all the precedents. And so is the indictment before us. And there was evidence tending to show that the prisoners did break and enter, and they were convicted by the jury. And yet they cannot be punished because of error committed on the trial. It was not left to the jury to say whether the prisoners did break and enter the house, but whether they broke out of the house. The Solicitor asked his Honor to charge, and his Honor did charge, the jury, "that if they believed that the defendants (however they may have got into the house) broke out of it, they were guilty." Now, as there was no charge that they broke out of the house, and as they could not be convicted of that with which they were not charged, it follows that their conviction was wrong. Grant that it (240) is just as much a crime to break out of a house as it is to break into it, just as it is as much a crime to kill a man with poison as with a sword, yet you cannot charge him with one crime and convict him of another; nor can you charge him with committing a crime in a certain manner and convict him of doing it in a different manner.

At common law it was at least doubtful whether one could be convicted of burglary even when charged with breaking out of a house. The better opinion seemed to be that the breaking must be for the purpose of effecting an *entrance,* and not for the purpose of effecting an *escape.* And therefore the statute of 12 Anne was passed, which made it burglary to break out of a house, the same as to break into it. The statute, after reciting "That there had been some doubts whether the entering the mansion house without breaking the same with an intent to commit some felony, and breaking said house in the night time to get out, were burglary," declared that "if any person shall enter into the mansion or dwelling-house of another by day or by night without breaking the same, with intent to commit felony, and shall in the night time break the said house to get out of the same, such person shall be guilty of burglary, as if he had broken into the house," etc. That statute was subsequently repealed and 8 Geo. IV. was passed, which provides that "if any person shall enter the dwelling-house of another with intent to commit felony, or, being in such house, shall commit any felony, and shall in either case break out of the said house in the night time, such person shall be deemed guilty of burglary."

It is clear that in order to convict under this statute it is necessary to charge that he did "break out," and not that he broke in. Such was the practice and such were the precedents and the decisions, which may be found collected in Leading Criminal Cases, 62. And the practice under the statutes were very strict. In one case the charge was *"did break to get out,"* and in another *"did break and get out."* Held not to be sufficient, for the words of the statute were "break out." And so the defendant was con- (241) victed of larceny only, and acquitted of burglary. In the case before us breaking out is not charged in the indictment in any form, but only breaking in; and yet the jury were told that they might convict of breaking out. If the prisoners had been charged in the indictment with breaking out, there was evidence upon which they might have been convicted; but there was no such charge, and therefore the conviction was erroneous.

Our statute, Bat. Rev., chap. 32, sec. 12, is substantially the same as the English statute.

There is error.

This will be certified.

PER CURIAM. *Venire de novo.*

STATE v. DAVID COLLINS, ALEX. BLALOCK and JACOB HOOD.

1. In criminal trials against two or more defendants, the Judge has the right in his discretion to separate the evidence bearing upon the case of each, and to instruct the jury as to what is competent against one and incompetent against another.
2. It is no good cause of challenge that the juror has formed and expressed an opinion adverse to the prisoner, such opinion being founded on rumor, and the juror further stating that he could try the case according to the law and evidence, uninfluenced by any opinion he may have so formed from such rumor.
3. When several persons are jointly indicted, they cannot claim separate trials as a matter of right. Such separation is a matter of discretion with the Court.
4. In trials for capital felonies, the presiding Judge has the right to regulate by reasonable rules and limitations the arguments in the cause: *Hence,* it is no good ground for a new trial that the counsel of the prisoner was limited by the Court in his remarks to one hour and a half.

(*State v. Ellington,* 29 N. C., 61; *State v. Benton,* 19 N. C., 196, and *State v. Smith,* 24 N. C., 402, cited and approved).

BYNUM, J., *dissenting.*

(242) INDICTMENT for the murder of one Allen Jones, tried at Fall Term, 1873, of JOHNSTON Superior Court, before *Watts, Judge.*

Upon the trial the prisoners excepted to the rulings of his Honor, which exceptions were noted and are fully set out in the opinion of the Court and in the dissenting opinion of *Justice Bynum,* as are also the facts touching the points decided.

Collins and Blalock were convicted; Hood acquitted. Motion for a new trial; motion overruled. Judgment and appeal.

Fuller & Ashe, Smith & Strong and *Spears.* for the prisoners.

Attorney-General Hargrove, for the State.

SETTLE, J. The prisoners, together with one Hood, were tried at Fall Term, 1873, of the Superior Court for Johnston County on an indictment charging them with the murder of one Allen Jones.

The jury returned a verdict acquitting Hood and convicting the prisoners. Several points made upon the record were abandoned upon the argument in this Court.

We will now consider all exceptions which require comment:

It would seem that the prisoner, Collins, joined the State in the prosecution of Hood, and introduced evidence against Hood which also implicated Blalock. To this Blalockk excepted.

His Honor allowed the jury to consider the evidence as against Hood, but told them it was not evidence against Blalock. There is nothing unusual in this practice. It frequently happens in joint trials that the Judge has to separate the evidence bearing upon the case of each prisoner and instruct the jury as to what is competent against one and incompetent against another.

The prisoner Collins excepts:

1. Because a juror was not rejected by the Court who stated that he "had formed or expressed" the opinion that the prisoner Collins was guilty, but who, on being asked (243) the foundation for his opinion, replied that it was founded upon rumor and not upon any evidence; and in answer to a further question he stated that he could try the case by the law and the evidence, and would not be influenced by any opinion he may have formed from rumor.

We understand from this that when the juror was tendered he was challenged by the prisoner Collins for cause, and the cause assigned was that he had formed and expressed an opinion adverse to the prisoner Collins, and therefore his Honor (in the stead of triers), after an examination of the juror, found him to be indifferent. The Court seems to have followed the practice adopted in the case of *State v. Ellington*, 29 N. C., 61, and the answers of the juror here are almost identical with those of a juror in that case.

The principles established in the case of the *State v. Ellington, supra*, following the case of the *State v. Benton*, 19 N. C., 196, is that an opinion fully made up and expressed is a good cause of principal challenge as a matter of law; but that one imperfectly formed, or one merely hypothetical—that is, formed on the supposition that the facts are as they have been represented—does not constitute cause of such a challenge, but of challenge to the favor, which is to be allowed or disallowed as the triers shall find the fact of favor or indifferency; and that when the Judge becomes satisfied that what the juror calls an opinion was not such in legal meaning, and that it had left no unfavorable bias on his mind, the challenge should be overruled.

To the very satisfactory reasons given in Ellington's case for this practice we will add that, in these days of newspapers, railroads and telegraphic communication, it is exceedingly difficult to find persons of sufficient intelligence to sit on a jury who have not heard something of almost every capital crime which occurs in the State. And if we disqualify all who have received some impression from such information or rumors and have casually expressed an opinion as to the guilt or innocence of the accused, we will exclude from the (244) jury box the best-educated and the most liberal-minded portion of the community. The better informed a juror is, the more apt will he be to guard against improper influences.

2. The prisoner Collins moved for a separate trial, stating that as he was a white man and the other prisoners were colored a severance was necessary to a fair trial. This motion was overruled, and Collins excepted.

Where several persons are jointly indicted they cannot claim separate trials as a matter of right.

Mr. Justice Story says, in *United States v. Marchant and Colson:* "This is a matter of sound discretion, to be exercised by the Court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence."

The same doctrine is laid down by the text writers, and is quoted with approbation in this State. *State v. Smith,* 2 Ired., 402.

Third Exception: "That in the argument of the case the constitutional rights of the prisoner, as declared in Art. I, sec. 11, of the Constitution of North Carolina, were infringed and in a great measure virtually denied him, inasmuch as only one hour and a half was allowed to him for the argument of his case, he asking for more time when the allotment of time was made by the presiding Judge, a large number of witnesses having been examined on both sides." In this country every one has a constitutional right in all criminal prosecutions to have counsel for his defense, and if he be too poor to employ counsel it is the duty of the Court to assign some one to defend him, and it is the duty of the counsel thus assigned to give to the accused the benefit of his best exertions. It is gratifying to be able to state that the bench and the bar in North Carolina have always dealt mercifully and generously with those who have had the double misfortune to be stricken with poverty and accused of crime.

This, we believe, is the first complaint that has reached the ears of this Court that any one accused of crime has been denied the full benefit of counsel for his defense; (245) for, although this right has sometimes been abused, yet the Judges, in the exercise of their discretion, have deemed it better to submit to an abuse rather than to have even the appearance of denying a right. We regret that complaint is now heard. And while we feel constrained by the weight of authority and reason to hold that a Judge must have the superintending control of his Court, with power to direct the proceedings of the same, so that the time shall not be wasted in arguments, disputes and contentions having no tendency to bring about a fair and legal disposition of judicial business, yet we do not recommend the ruling of his Honor in the case before us as a precedent worthy of general imitation.

In *Wood's case,* 7 Leigh, 743, the Court refused to allow counsel to address either the jury or the Court. Upon appeal this was held to be error, but the Court says: "While we thus decide, we are not to be understood as restricting, in any degree, the power of the Court to prevent an abuse of this or any other right by exercising a proper control over the course of the argument."

In *Commonwealth v. Porter*, 10 Met., 263, the Court says: "It is within the legitimate power and it is the duty of the Court to superintend the course of the trial; to decide upon the admission and rejection of evidence; to decide upon the use of any books, papers, documents, cases or works of supposed authority which may be offered on either side; to decide upon all collateral and incidental proceedings, and to confine parties and counsel to the matters within the issue."

In *Lynch v. State,* 9 Ind., 541, it is said "the Court has a right to regulate by reasonable rules and limitations the argument of counsel. This is a necessary discretion to be possessed by the Court to prevent abuse."

The only case we have been able to find which would seem to be in conflict with these authorities is *People v. Keenan*, 13 Cal., 581, where the counsel for the prisoner was (246) limited in his argument, as in our case, to one hour and a half.

The Supreme Court, acting upon "the affidavits of counsel of respectability and standing, which shows that they were prevented by this restriction from a full and fair defense of their client," granted a new trial, yet in doing so the Court says: "An enlarged discretion must necessarily be given to a Judge over this subject, and we should certainly with great reluctance disturb the exercise of that discretion in any given case. Nor do we here question the right of a district Judge to limit the counsel to a reasonable time in their arguments to the jury, though from the danger to which this power is exposed it is perhaps better, if ever done at all in capital cases, that it should only be done in very extraordinary and peculiar instances."

It seems to us that the admission of a discretion in a Judge to limit the counsel is at the same time a denial of the right to review the exercise of that discretion.

While Judges, like other men, are liable to make mistakes, yet it is apprehended that the substantial ends of justice will be better served by giving to them the general supervision of the Courts than by depriving them of powers necessary for the protection of the Courts and the dispatch of business. It is to be presumed that the Judge who sees and hears all the incidents of a trial is better qualified to exercise a discretion as to its conduct than the Justices of the Supreme Court who have only the limited view afforded by the record. Upon consideration of the whole case, we are of opinion that there is no error.

PER CURIAM. Judgment affirmed.

BYNUM, J., dissenting. In my opinion, the prisoners have not been convicted according to law, but a startling and dangerous invasion has been made of the right of trial by jury, of the freedom and discretion of counsel, and of the constitutional rights of the accused to a full and fair (247) defense. Article I, section 11, of the Constitution declares that "in all criminal prosecutions every man has the right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony, and to have counsel for his defense," and this is again enjoined in a statute—Battle's Revisal, chap. 33, sec. 59—"Every person accused of any crime whatsoever shall be entitled to counsel in all matters which may be necessary for his defense."

If the counsel are not herein constituted the judges of what may be necessary both to speak and do in the defense, then we are to reverse all the rules of interpretation and forget all our knowledge of the duties and rights of counsel. The law does not confer arbitrary power on the Judge nor impose tame submission on counsel. Each in his sphere is independent, and neither can encroach upon the entire freedom and discretion of the other. It is only the *abuse* that can authorize interference, and when that occurs the counsel has a remedy by appeal and the Judge by a direct interposition in the cause.

To me it is an alarming proposition that a Judge, who is not responsible for the right conduct of a cause, can, without any necessity, cause or reason, put the counsel of the accused under the ban by crippling his argument by an arbitrary restriction. If, on a trial for murder, a prisoner without counsel should rise to address a jury for his life, and the Judge should command him to make his defense in one hour and a half, it would strike the spectators with surprise and indignation, yet it is settled that the counsel of the prisoner has all the rights of the prisoner, and for the time is the embodiment of the accused himself. Look at it. Three persons are on trial for their lives and making several defenses. Many witnesses are examined and the testimony is conflicting. The evidence is closed and the argument about to begin. Just then, without any previous warning, the Judge announces to the prisoners' counsel: "You shall have only an hour and a half for your address to the jury." And, with- (248) out time or opportunity to re-arrange and condense the argument within the limit, even if it were possible, and against the will of counsel, the trial is rushed through with unprecedented haste and the prisoners convicted! "Next to doing right, the great object in the administration of public justice should be to give public satisfaction."

When Sir Walter Raleigh was put on his trial for treason the Judges attempted to stop him in his defense, but he had the manhood to assert his rights. *"My Lords,"* said he, *"I stand for my life."* Posterity has vindicated him and condemned his Judges.

In the times of the Stuarts it was not uncommon to try, convict and execute a dozen persons at a time and in one day, but a capital trial is not now what it was then. In the eye of the law and Christian civilization human life has more significance, the safeguards thrown around it are proportionately increased, and the science of defense more minute, intricate and exhaustive. Trials which formerly would occupy hours only now require days and often weeks. Who can know what word or thought may strike the mind of a jury and turn the balanced scale in favor of human life, or when that word or thought may be uttered? If, therefore, a turn of thought or a suggestion which might legitimately be made is cut off and excluded from the jury by a causeless limitation of time, and a life is lost in consequence, a fearful accountability rests somewhere.

I do not claim to restrict the legal discretion of the Judge, or any of his functions as a presiding magistrate. I only affirm that he cannot limit the legal discretion of counsel to conduct his defense as his judgment and conscience may dictate under the solemn trust imposed on him, not by leave of the Court, but by the authority of the law, equally binding upon Judge and counsel. There is no pretense here that the counsel was abusing his privilege, for the argument had not begun. If a Judge can ever interfere, as here, it
(249) must be to arrest an *actual abuse,* not to anticipate
what may never occur and cramp and fetter the freedom of debate by arbitrary and embarrassing restrictions.

The question is not whether the Judge can supervise and control the proceedings of the Court, but whether he can, without cause or provocation, at his own will and caprice, interfere with and control others who are in the regular and legal discharge of the most grave and solemn duty which can be imposed upon them. Was time important? No. The trial began on Monday and court was adjourned on Wednesday. Are men to be tried for their lives by the hour-glass? Courts of *justice* are instituted for no such purpose, and to bend them to it is a perversion and they become engines of oppression. A slight self-examination will show us that we may impose voluntary restrictions upon ourselves, because we are therein governed by a knowledge of our own powers and capacities to do a given thing in a given time. But when others who have not this knowledge impose restrictions against our consent, the mind instinctively feels and is shackled and imprisoned. It is only when free from restraint, like the body, that all its activities can be brought into action, and what more sacred and awful demand can be made for the development of all its varied powers and energies than in defense of human life!

The judicial annals of our State, it is believed, afford no other instance of such an exercise of power. It is without precedent here. On the contrary, it is within the memory of many that an eminent counsel in this State confessedly spoke against time to save the life of the accused by the expiration of the term of the Court. *State v. Spier,* 12 N. C., 491. If there could be an occasion for the interference of the Court, that was one, for the term could not be extended to the end of the trial, as now. Yet the Judge dared not to stop the counsel, and the Legislature sanctioned the conduct of the Judge, for shortly thereafter, and in consequence of this very case, it passed an act enabling the Judge, *in capital cases only,* to extend the term from day to day until the trial is finished. Rev. Code, chap. 31, sec. 16. Thus we have (250) the legislative construction of the force and extent of that humane provision of the Constitution in favor of life. It cannot be that we are called upon to furnish the authority of precedents to sanction the instincts of our nature in common with the brutes, the right of self-defense, but if so, we have only to open our eyes to the living history around us. From the time of *Erskine,* who first fixed the right of counsel, of juries, and of the accused, upon their proper foundations, the criminal annals of England and America furnish scarcely a precedent where twice the time allotted here was not required and wisely consumed by counsel in the legitimate defense of the accused.

I am, therefore, of opinion that there was error, and that the prisoners are entitled to a *venire de novo.*

RODMAN, J., concurs in the dissenting opinion.

Cited: State v. Hill, 72 N. C., 353; *State v. Miller,* 75 N. C., 74; *State v. Kilgore,* 93 N. C., 534; *State v. Green,* 95 N. C., 616; *State v. De Graff,* 113 N. C., 691; *Dunn v. R. R.,* 131 N. C., 447; *State v. Register,* 133 N. C., 751. *For changes in Statute, see Code (1883), sec. 30; Laws 1903, chap. 433.*

STATE v. J. L. YARBOROUGH and others.

The distribution of judicial powers by Art. IV of the Constitution is a virtual repeal of all laws giving jurisdiction to Justices of the Peace in case of forcible entry and detainer, except for the binding of trespassers to the Superior Court to answer a criminal charge. *Therefore,* where four or more men enter upon premises in the actual possession of another by virtue of a warrant and proceedings before a magistrate, which are a nullity, and eject such person and his family from the house they were occupying, they are guilty of a forcible trespass.

(*Credle v. Gibbs,* 65 N. C., 192; *State v. Hanks,* 66 N. C., 613; *State v. Ellen,* 68 N. C., 282, and *Perry v. Tupper, post,* 538, cited and approved).

INDICTMENT (forcible trespass), tried before *Logan, Judge,* Fall Term, 1873, of CLEVELAND.

On the trial below the jury found the following special verdict:

One Jordan Jenkins did, 20 December, 1873, lease (251) in writing the land upon which the trespass is alleged to have been committed from one Ben Bowen. Bowen and Jenkins erected a house on the land, and Jenkins soon thereafter moved into the house with his family, occupying the same peaceably and unmolested for about seven weeks; at the end of which time an officer summoned him to trial at the house of the defendant Yarborough, which was near by. Yarborough had before that demanded the premises of Jenkins' wife, he not being at home, and previous to that demand had forbidden Bowen to enter on the land. The proceedings at the trial which took place at Yarborough's were offered by defendants, and after objection by the Solicitor, admitted by the Court. (These proceedings do not accompany the case.)

The jury likewise find as a fact that immediately after the trial, and in pursuance of the judgment rendered therein, the defendants went to the house of Jenkins and expelled him and family, and carried his household goods into the woods, at the same time putting Yarborough into possession.

Yarborough on the trial claimed the title to the premises, of which Jenkins exhibited a written lease from Bowen for the year 1873, Bowen also claiming to have the title.

Two years before this proceeding, Bowen leased the same land to his son-in-law, who cultivated it, and Bowen was in the habit of getting timber from the land without interruption up to the time of the ejectment of Jenkins. That after Bowen's son- in-law had cultivated it, the defendant, Yarborough, had sown a crop of oats on the premises, a part of which Bowen cut and carried away as an equivalent for rent, although forbidden by Yarborough to enter on the premises without his consent. That in the fall of 1872, Yarborough again sowed oats, which were there when Jenkins entered, and whose stock destroyed them.

The jury further find that defendant Yarborough sued out the proceedings before the magistrate, was present and assisted in removing the household things when brought to the door of the house; that the defendant, Smith, was the magistrate who tried the case, and was present and also assisted, and that the remaining defendants were the jurors. (252) That there was no malice in the proceedings or corrupt motive. And that at the time Jenkins entered upon the premises there was a suit pending in the Superior Court in regard to the title, Bowen being plaintiff therein and Yarborough defendant.

If from the foregoing facts the Court be of opinion that the defendants were guilty, then the jury find them guilty; but if in law the defendants are not guilty as charged, then the jury find them not guilty.

His Honor being of opinion that the defendants were not guilty, the jury rendered their verdict accordingly. Judgment and appeal by the State.

Attorney-General Hargrove, for the State, cited and relied on 3 Chit. Crim. Law, 1135; no excuse that defendants enter to enforce a lawful claim. 1 Bishop's Crim. Law, 477, 479.

L. W. Barringer, with whom was *R. T. Gray,* for defendants:

As to the jurisdiction of the magistrate:

1. The magistrate and the other defendants acted under and by authority of chap. 29, Bat. Rev.

2. It is in the nature of a criminal proceeding before a magistrate to dispossess an intruder. The title did not come in question; it was being investigated elsewhere in a Superior Court.

3. Jurisdiction of a magistrate not a nullity. *Dulin v. Howard,* 66 N. C., 433.

Were not forbidden:

1. "The statute of 1865-'66 was made to keep off interlopers if they intruded after being forbidden." *State v. Hanks.* 66 N. C., 613. Acted with no malice or intent of doing wrong, but in ignorance, under color of judicial proceedings.
State v. Hanks, 66 N. C., 614; *State v. Ellen* 68 N.
(253) C., 282, and case cited; *State v. Dodson,* 6 Cald.
Not liable criminally, but, if at all, civilly. *State v. Dodson,* 6 Cald., 545, chap. 29, Bat. Rev. (now existing law), saves magistrates, officers, jurors, party from criminal indictment.

SETTLE, J. The distribution of judicial powers by Article IV of the Constitution is a virtual repeal of all laws giving jurisdiction to justices of the peace in cases of forcible entry and detainer, except for the purpose of binding trespassers over to the Superior Court to answer a criminal charge. *Perry v. Tupper,* (*post,* 538). We have then an indictment at common law for a forcible entry made in 1873, and the defense relied upon is a certain proceeding had before a Justice of the Peace under the statute of forcible entry and detainer. Rev. Code, chap. 49, which had been repealed in 1868 by the Constitution.

A Justice of the Peace has now no jurisdiction where the title to real estate shall be in controversy. But he may have jurisdiction where the title does not come in question, as in the case where a tenant holds over after the expiration of his term; for there, by reason of the privity of estate, the tenant is estopped to deny the title of the landlord; and before he can take advantage of a defect in the landlord's title the premises must be restored to the landlord. *Credle v. Gibbs,* 65 N. C., 192. But forcible entry is an offense indictable at common law, without regard to any statute, English or American.

No one has a right, at common law, to enforce a claim, however just, by the commission of a breach of the public order and tranquility. Bishop's Crim. Law, sec. 464.

Upon the argument we were referred by the defendant's counsel to the cases of *State v. Hanks,* 66 N. C., 613, and *State v. Ellen,* 68 N. C., 282, where the defendants were held to be not guilty, because they entered under a *bona fide* claim of title; but it will be observed that they were indicted under the Act of 1866, chap. 60 (Bat. Rev., chap., 32, sec. 116), which, so far from diminishing the class of in- (254) dictable trespasses, has greatly enlarged it, and subjected to criminal prosecution mere casual trespassers, or "interlopers," to use the expressive term of *Justice Boyden* in *State v. Hanks,* who have been forbidden to enter on the premises of another. It is true no clause of the act declares that "if any person not being the present owner or *bona fide* claimant of such premises shall willfully and unlawfully enter thereon and carry off or be engaged in the act of carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be deemed guilty of larceny, and punished as for that offense. And if not done with such intent he shall be deemed guilty of a misdemeanor."

This act is so badly worded as scarcely to be intelligible, and the saving in favor of *bona fide* claimants is only found in the clause which imposes the pains and penalties of larceny upon certain acts of trespass. This act cannot be tortured to mean that where four men come upon premises in the actual possession of another without color of authority (for the proceedings before the Justice of the Peace under which the defendants justify are not absolute nullity for the purposes of protection), and eject him and his family from the house they are occupying, and carry his effect into the woods, they shall not be indicted.

It cannot be that the Legislature intended that every *bona fide* claimant of land should take the redress of his real or supposed grievances into his own hands.

The judgment of the Superior Court is reversed. Let this be certified, to the end that the Superior Court may proceed to judgment upon the special verdict.

PER CURIAM. Judgment reversed.

Bynum, J., did not sit.

Cited: R. R. v. Sharpe, post, 510; *Perry v. Shepherd,* 78 N. C., 87.

(255)

JAMES JENKINS, administrator, etc., v. JAMES W. JARRETT.

When a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast on the purchaser all future risk, if nothing remains to be done to the goods, although such purchaser cannot take them away without paying the price. *Therefore,* a levy of an execution on a horse which had been sold, but not delivered, as the property of the purchaser of such horse, was valid.

(*May v. Gentry,* 20 N. C., 249, cited and approved).

CIVIL ACTION, brought to recover the value of a horse, tried upon a case agreed, by *Clarke, Judge,* Fall Term, 1873, of WILSON Superior Court.

Upon the trial, his Honor being of opinion with defendant gave judgment accordingly, from which judgment the plaintiff appealed.

The facts upon which the decision of the Court is based are found fully stated in the opinion of *Justice Rodman.*

Smith & Strong, for appellants.

No counsel in this Court, *contra.*

RODMAN, J. This is an action to recover a horse. The case is as follows:

Sometime before the year 1868, Taylor, who owned the horse, sold and delivered to Barnes and took Barnes' note for the price. Afterwards he agreed with Barnes to take the horse back and credit Barnes' note with $200. The horse was not re-delivered to Taylor, Barnes saying he would keep the horse until he got in better condition; nor was Barnes' note then credited according to the agreement. While the horse was thus in the possession of Barnes, Taylor agreed to sell him to the plaintiff in payment of a debt which he owed to plaintiff. Taylor informed Barnes of this sale, and Barnes sent the horse to Taylor, who received him, as he said, for plaintiff, and sent word to plaintiff to come and get (256) the horse, which he did. While the horse was in the possession of Barnes, and after the re-sale by him to Taylor (if it amounted to a re-sale), an execution against Taylor, issued upon a judgment in the Circuit Court of the United States, tested of a day during such possession by Barnes. Under this execution the marshal levied on the horse as the property of Taylor when defendant purchased. The only question in the case is whether the transaction between Barnes and Taylor amounted to a re-sale by Barnes to Taylor, and vested the property in Taylor, between that time and his sale to Jenkins, the plaintiff.

We are of opinion that it did. The law is clearly stated in Blackburn on Sales, 148. The author cites the opinion of *Bayley, Judge,* in *Simmons v. Swift,* 5 B. & C., 862: "Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about the payment or delivery, the property passes immediately, so as to cast on the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price."

Blackburn says: "When the parties are agreed as to the goods on which the agreement is to attach, the presumption is that the parties intended the right of property to be transferred at once, unless there be something to indicate a contrary intention." See also, Benjamin on Sales, 233.

In this case there was nothing to be done either to put the horse in a deliverable condition or to ascertain the price or mode of payment, and nothing to indicate an intention that the property should not pass at the time. Barnes says he will keep the horse until he is in better condition, to which Taylor assents; but there is nothing to show that he was not to keep him as the agent of Taylor, and he sends him to Taylor without requiring a credit for the $200 to be entered on his note.

May v. Gentry, 20 N. C., 249, which might be supposed, from the digest of it to contain a different doctrine will be found on examination not to do so. The decision went on the ground that the parties never came to any final agreement as to the terms of the sale. (257) What is said about delivery and earnest money is clearly added as a mere supplementary make-weight to the previous reason and was unnecessary.

As the property in the horse passed to Taylor, it was bound by the execution against him, tested before his sale to the plaintiff.

According to the case agreed there must be judgment for the defendant.

PER CURIAM. Judgment affirmed.

Cited: Gwyn v. R. R., 85 N. C., 431; *Brown v. Mitchell,* 102 N. C., 370; *McArthur v. Mathis,* 133 N. C., 143.

DEMADES REDMAN and others v. THOMAS REDMAN, ABSALOM REDMAN and others, administrators (with the will annexed) of HOSEA REDMAN.

1. When a party to a suit, who is *in interest* really a plaintiff, but appears as a party defendant, gives evidence as to a transaction with a deceased testator, it renders competent the evidence of a co-defendant touching the same transaction, as provided for by section 343, C. C. P.

2. If the declaration of a testator made in his life-time, not in the presence of the defendant, could not be given in evidence because of his not being permitted to make evidence for himself, his administrator will not be allowed to prove such declarations after his death.

CIVIL ACTION (issues submitted to a jury under the direction of the Supreme Court), tried before *Mitchell, Judge,* Fall Term, 1873, Superior Court of CATAWBA, having been removed thereto from Iredell.

At the Spring Term, 1866, of the Court of Equity of Iredell County, the plaintiffs, as next of kin of Hosea Redman, filed their bill against the defendants, who are administrators with the will annexed of said Hosea, and also of his next of kin. The object of the bill was to have an account and settle-

ment with the administrators with the will annexed.
The plaintiffs charged that there was some $600 in (258) gold and silver belonging to the estate, which was admitted by two of the defendants, but denied by the defendant, Thomas Redman, who had possession and claimed it as his individual property. The Court ordered an issue to be submitted to the jury, to find whether the gold and silver thus claimed was the property of the testator at the time of his death or was the property of the said Thomas.

On the trial of the issue, the plaintiff introduced one of the defendants, Absalom Redman, as a witness, and proved by him conversations he had with the testator, Hosea, in his lifetime, about this gold and silver now in controversy and which at the time the said Hosea had in possession and claimed as his own.

The defendant's counsel then introduced Thomas, also a defendant, but claiming the property, and proposed to prove that at a different time from that spoken of by Absalom the said Hosea had gone with him, Thomas, to a lumber-house belonging to Hosea, that they took this gold and silver with them; and he, Thomas, in the presence of the said Hosea, hid the same in the lumber-house. That at the same time the said Hosea gave to him a paper writing, in which he acknowledged that the said gold and silver belonged to him, Thomas, which paper was now lost. The plaintiffs objected to the introduction of this testimony, but it was admitted by the Court.

Plaintiffs then offered to prove conversations of the said Hosea, about the gold, etc., not, however, connected with its possession by him, and also other conversations of his, the said Hosea, in the absence of the said Thomas. This evidence was objected to by defendants and rejected by the Court.

Before the evidence given by the said Thomas as before stated, Absalom had testified that he in company with the said Hosea, and in the absence of Thomas, had gone to the lumber-house and seen the gold and silver in dispute; that it was in possession of the said Hosea, who claimed it as his; and that a short time thereafter he saw the said Hosea again have in his possession, at the same time claiming it as (259) his property. Absalom further stated that after this suit was originally brought in the Court of Equity, Thomas

Redman had presented a paper which he claimed to be a certificate of deposit of the said gold and silver signed by the said Hosea; that the same was read in the presence of the administrators by one John M. Redman, and that they had then declared that the body of the receipt was a forgery.

The Court submitted to the jury the issue as to the ownership of this gold and silver, who found it to be the individual property of Thomas Redman.

Rule for a new trial granted and discharged. Judgment in accordance with the verdict; from which plaintiffs appealed, assigning as grounds:

1. Because the Court permitted the defendant, Thomas Redman, to prove declarations and transactions between himself and Hosea Redman, deceased, which had not been spoken of by any of the administrators or plaintiffs.

2. Because the Court rejected the declarations of the said Hosea Redman, deceased, as to the ownership of the gold and silver, because they were neither made in the presence of the defendant, nor immediately connected with the possession of said gold and silver.

3. Because after the defendants had proven declarations of the said Hosea that he had been robbed of all his gold and silver, the Court rejected other declarations of the said Hosea, offered by the plaintiffs, in which he said *he had not been robbed* of all his gold and silver.

Caldwell and *Armfield,* for appellants.
Schenck, McCorkle & Bailey, contra.

(261) READE, J. The jury found that the $600 of gold and silver in controversy was the property of the defendant Thomas, and that is conclusive, unless the plaintiff's exceptions to the admissibility of evidence can be sustained.

When Thomas Redman, the defendant, offered to testify as to a transaction between himself and his deceased father about the gold and silver, he was clearly incompetent, under the general provisions of C. C. P., sec. 343. But he says that he took himself out of the general provision by the fact that the plaintiff had examined Absalom Redman as to the declarations of the deceased in regard to the same transaction. That fact would have made it competent for the defendant Thomas to speak of it if Absalom Redman had been the plaintiff; but he was one of the defendants, and it is only where the *plaintiff* speaks of a transaction with the deceased that the defendant may do so too. But under the circumstances of this case, we have to treat Absalom, the defendant and witness, as if he were the plaintiff, for he was the plaintiff *in interest,* although he is nominally the defendant. All the children and next of kin of the deceased, of whom Absalom was one, claim that the gold and silver in controversy was the property of their father, the deceased; and are trying to make the defendant Thomas, the administrator and also a son of the deceased, account for it to the estate, while he, Thomas, claims it as his own. So that all the other children and next of kin are plaintiffs *in interest* and are to be considered as plaintiffs in fact. So that when Absalom testified as a witness of the transaction with the deceased, it is to be considered that he testified as a party plaintiff; and then that made it competent for the defendant Thomas to testify also as to that transaction. In considering the other two exceptions by the plaintiff to the evidence we may consider the case as if Hosea Redman, the deceased, were alive and claiming the money of the defendant Thomas.

And then, very clearly, Hosea could not give in evidence his own declarations made out of the presence of the defendant Thomas that the money was his. That would (262) be to make evidence for himself. That disposes of the second exception.

It was competent for the defendant Thomas to prove that Hosea said he had been robbed of all his gold and silver, for the purpose of establishing the fact that Hosea had no gold and silver. But it would have been incompetent for Hosea to prove that at some other time he had said that he had not been robbed of his gold and silver. That would be to make evidence for himself. That disposes of the third exception.

There is no other exception in the record; and we consider no other.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

BYNUM, J. did not sit.

Cited: Weinstein v. Patrick, 75 N. C., 346; *Owens v. Phelps*, 92 N. C., 235; *In re Worth's Will,* 129 N. C., 226.

JOHN S. BOYKIN and wife, ALGATHA, v. HARRIS BOYKIN and wife, POLLY, and others.

At common law, neither the husband nor the wife is allowed to prove the fact of access or non-access; and as such rule is founded "upon decency, morality and public policy," it is not changed by chapter 43, section 15, Bat. Rev. (C. C. P., sec. 340), allowing parties to testify in their own behalf.

(*State v. Petteway*, 10 N. C., 623, cited and approved).

CIVIL ACTION, in the nature of a petition for partition of lands, filed in the Probate Court, thence carried to the Superior Court of WILSON, where it was tried on issues submitted to a jury, before *Clarke, Judge,* at Spring Term, 1873.

The case comes to this Court upon the appeal of the plaintiff, who excepted to the rejection by the Court of certain evidence by them offered, tending to establish the legitimacy of the *feme* plaintiff, the issue then joined.

The facts relating to the point decided are fully set out in the opinion of the Court.

(263) *Faircloth & Granger,* for appellants.
Smith & Strong, contra.

BYNUM, J. In 1870 one Nelson Kent died intestate, seized of the land in dispute, and without issue, but leaving brothers and sisters, his only heirs at law.

Algatha, the female plaintiff, claims that she is a sister of the intestate and one of his heirs at law. It was admitted that the intestate and the defendants were the legitimate issue of Wiley Kent and Milly Kent, and also that plaintiff, Algatha, was the daughter of said Milly, and born in wedlock, and as to her the following issue was made up by consent and submitted to the jury, to-wit: "Was Algatha Boykin, the female plaintiff, the legitimate child of Wiley Kent and Milly Kent?"

The defendants introduced evidence tending to show non-access of said Wiley and Milly during the period of gestation, immediately preceding the birth of Algatha.

The plaintiff then offered the deposition of Milly Kent, the mother, since deceased, for the purpose of establishing the paternity of her several children. His Honor allowed certain portions of the deposition to be read, but rejected that part wherein she testified that her husband, Wiley Kent, was the father of Algatha, the plaintiff. The plaintiff excepted. There was a verdict for the defendant, and the plaintiff appealed.

In 2 Greenl., 132, it is laid down that the fact of access may be proved by the husband and wife, but the adjudged cases he refers to as establishing that proposition fall short of sustaining him, and no other elementary writer supports such a principle of evidence.

In the case of the *King v. Lourton,* 31 Eng. C. L., 312, all the cases affecting the admissibility of this kind of evidence is reviewed and the true principle clearly enunciated by all the Judges. *Lord Denman:* "It is desirable to show, in a case of such importance as this, that we adhere to the old rule of law without any doubt. The rule cited in 2 Stark. Ev., 139, note x, from *Goodright v. Moss,* 2 Cowp., 591, supported by *Rex v. Rea,* 11 East., 132, is that (264) parties shall not be permitted, after marriage, to say that they had no connection. Then, it being clear and indisputable that for the purpose of proving non-access neither husband nor wife can be a witness," etc. *Littledale, Judge,* in the same case: "But I think it (the rule) extends further and excludes all questions which have a *tendency* to prove *access* or *non-access.* Suppose, in a dispute respecting legitimacy, it were an issue directed by the Court of Chancery whether the husband and wife had or had not access to each other at such a time, I should say that neither of them could answer any question having a tendency to prove the negative or affirmative of that single issue." So *Patterson, Judge:* "It is trifling to say that all inquiries may be made of a witness, close up to the point of access or non-access, so that by the variation of terms the direct question on that subject be avoided.

"Whether the investigation arise upon an issue out of chancery, or whether it be raised as it was in the present case, the question as to access or non-access is not to be asked at all in examining the husband or wife." And to the same effect was *Williams, Judge.*

It is then conclusively settled that at common law neither the husband or wife could prove access or non-access, and it is equally well settled that where they were not allowed to make such proof during marriage, neither will be allowed to do so after the death of the other, thus removing one great cause of distrust by making the confidence which once subsists ever afterwards inviolable in courts of law. 1 Phil. Ev., 70-80. There are exceptions to this rule, founded on *necessity,* where to exclude such evidence would occasion insecurity to that very relation of society which it was the object of the rule to protect. In all such cases of necessity, as, for instance, personal violence, rape, bastardy and articles of the peace, the authorities for admitting the wife's testimony in favor of the husband are equally authorities for receiving it when against him, and the rule is limited to the necessity. When a child is born in wedlock it is presumed in law to be legitimate, (265) and at one time this presumption could not be rebutted if the husband was *intra quartuor maria* during the period of gestation, but this doctrine was exploded in the case of *Pendril v. Pendril,* 2 Str., 925, and gave way to the modern doctrine that this presumption of legitimacy may be rebutted by any competent evidence tending to show and satisfy the jury that such intercourse did not take place at any time when by the laws of nature the husband could have been father of the child. 2 Greenl. Ev., 130, 131.

In practice it can seldom happen that there can be anything gained by introducing the wife to prove access, for, since the law presumes legitimacy on proof of birth in wedlock, the whole burden of proving non-access is thrown upon the party who affirms this negative proposition so difficult of proof. If it should sometimes happen that evidence of access by the wife would promote the ends of justice, the law says it is better to suffer the occasional hardship than by lifting the veil from the domestic sanctuary to expose to public view the secrets and scandals of private life.

Such being the rule at common law, it remains to be seen whether the recent changes in the law of evidence in our State affect this case.

When the statute allowed parties to testify in their own behalf there was no longer any reason for excluding husband and wife on account of *interest,* and that barrier was swept away by chapter 43, section 15, Bat. Rev., and C. C. P., sec. 340. But the reason why the wife was not allowed to prove access or non-access is, by *Lord Mansfield* and all other authorities, declared to be "founded in decency, morality and public policy." *Goodright v. Moss,* 2 Cowp., 591; *State v. Petteway,* 10 N. C., 363; 2 Str., 1076; 8 East., 196.

It cannot for a moment be supposed that the laws of "decency and morality" are less binding upon us than upon our more unenlightened ancestors. Therefore, as might be expected, our recent legislation upon this subject (C. C. P., sec. 340) contains a saving clause which preserves the ancient rule of evidence intact. "Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding, or in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation. No husband or wife shall be compelled to disclose any confidential communication made by the one to the other during marriage." (266)

In our opinion this proviso, in both spirit and letter, maintains the common law rule and excludes the evidence which his Honor rejected.

It is admitted on all sides that the wife cannot bastardize her issue born in wedlock by proving non-access, but it is contended that she may establish their legitimacy by proving access. Apart from the authorities before recited directly opposed to this position, a slight examination of the principles of evidence will expose its fallacy. For if the wife can give evidence of access, she can, by cross-examination, be made to prove non-access, as it is a universal principle, without a single exception, that where a witness is introduced to prove a fact in issue she may be cross-examined as to that fact, so as to disprove it and establish directly the reverse. If, therefore, the wife becomes a witness to prove access, she at the same moment becomes a witness to prove non-access, thus exposing the absurdity of the proposition that she may be examined to prove access, but cannot be examined to prove non-access.

Such is the view taken in the cases cited above, and such is one of the reasons given why she is wholly excluded as an incompetent witness to that fact, although competent to prove any other distinct substantive part. Bishop Marriage and Divorce, sec. 447.

There is no error.

PER CURIAM. Judgment affirmed.

(267)

JOHN S. MAXWELL, administrator, v. THOMAS T. MAXWELL and others.

The entries on the record that certain exceptions were to be passed upon by the Court as of this term, followed by the judgment of the Court, are conclusive of the waiver of a jury trial by the parties, and cannot be impeached.

CIVIL ACTION, remanded from this Court at June Term, 1872 (67 N. C., 383), to Superior Court of DAVIE, where it was tried by *Cloud, Judge,* Spring Term, 1873.

From the judgment rendered by his Honor the defendants appealed.

All the facts necessary to an understanding of the decision of the Court will be found in the opinion of *Justice Settle.*

W. H. Bailey, for appellants.

Batchelor, Edwards & Batchelor and *Brown, contra.*

SETTLE, J. This case was before us at June Term, 1872, and is reported in 67 N. C., 383. The judgment of the Superior Court holding the reference to Price and Lunn to be at an end, being then reversed, the case was remanded, with directions to proceed according to law. The Court did proceed to find the facts and to declare the law thereon; but the defendants insist that they have never waived a jury trial and that his Honor was not authorized to find the facts.

It appears from the record now before us that at Spring Term, 1873, the plaintiff filed exceptions to the report of the said referees; and at the same term of the Court the following entries were made upon the record: "Motion by defendants' counsel to confirm the report"; "Exceptions to the report by plaintiffs' counsel; *to be passed on by the Court as of this term."* And then comes the judgment of the Court, to-wit: "This action coming on for trial upon the complaint, answer of the defendant, report of the commissioners, Charles Price and B. F. Lunn, and the exceptions filed thereto by plaintiff, and proofs taken, *and the matters of fact* (268) *having been agreed by the parties to be tried by the Court,* and the matter being fully heard, and the proofs and pleadings considered and debated by counsel, the Court doth find," etc.

These entries of record are conclusive of the waiver of a jury trial and cannot be impeached.

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

W. H. WILLARD v. F. J. SATCHWELL, Sheriff, etc.

Whenever a sheriff into whose hands an execution is placed levies the same and advertises a sale, he becomes entitled to his commissions. And if the plaintiff in the execution receives the amount from the debtor, and orders the same to be returned unexecuted, he makes himself liable for the sheriff's fees.

(*Dibble v. Aycock,* 58 N. C., 399; *Mattock v. Gray,* 11 N. C., 1; *Kincaid v. Smith,* 35 N. C., 496, cited and approved).

CIVIL ACTION, commenced in the court of a justice of the peace and tried at Fall Term, 1873, Superior Court of BEAUFORT, before *Moore, Judge.*

An execution had issued from the Supreme Court against the plaintiff in this action, Willard, and came regularly into the hands of the present defendant, who was sheriff of Beaufort county. The sheriff levied the same on the real estate of Willard, and advertised it for sale. A short time before the sale Willard pays the judgment to the Clerk of the Supreme Court, who recalled the execution. The sheriff refused to return the execution unless Willard would pay his commissions. This Willard refused to do until the sheriff threatened to sell, when he paid the commissions under protest and brought this action to recover the amount so paid.

The defendant here, the sheriff, insists that he is (269) lawfully entitled to the commissions, after having levied on the property and advertised it.

There was a judgment against the defendant in the Court below, and he appealed.

Battle & Son, for appellant.
Warren & Carter, contra.

BYNUM, J. An execution was issued from the Supreme Court to the sheriff of Beaufort, and by him levied upon the land of Willard, the defendant in the execution. After the levy and shortly before the sale the defendant in the execution paid the execution debt into the Clerk's office, and thereupon the Clerk, as the case states, "recalled" the execution. The sheriff threatened to sell unless the defendant would pay his commissions on the debt, which he did under protest, and brought this action to recover the sum thus paid.

The Clerk had no power to recall the execution, and the sheriff had the right to obey the exigency of the writ in his hand, and to sell as well for the debt as his commissions. Having satisfied the debt, the remedy of the defendant formerly would have been by *audita querela*, and now by motion in the cause. 1 Toml. L. D., 130; Raymond 439, 3 Bl., 406.

Where a levy is made and the plaintiff in the execution recovers the debt and orders the return of the execution unexecuted, he makes himself liable for the sheriff's fees, and if the defendant, by his act, prevents a sale after levy, the law will consider the writ as if executed and the officer will be entitled to his commissions from the defendant. Such seems to be the principle established by the decisions. In *Dibble v. Aycock*, 58 N. C., 699, the sheriff had made a levy and was prevented from selling by injunction, pending which $7,000 was paid into office. It was held that he was entitled to commissions on that sum, because it was paid while the precept was
(270) in his hands, and after a levy. To a similar purpose
are *Mattock v. Fray*, 11 N. C., 1, and *Kincaid v. Smith*, 35 N. C., 496.

Both law and good morals concur here, as it appears to be an evasion to deprive the officer of his legal fees.

There is error. Judgment reversed.

PER CURIAM. *Venire de novo.*

Cited: Dawson v. Grafflin, 84 N. C., 104.

C. C. WADE and NOAH SMITHERMAN v. AARON H. SAUNDERS, J. R. MORTON and JESSE H. SAUNDERS.

1. A sheriff who advertises a sale of land levied upon under execution, to take place on Monday, the first day of the term, as prescribed by law, which sale is postponed from day to day, has a right to sell the same on the Friday succeeding.
2. A purchaser of land from one claiming the same under a deed declared by the jury to be fraudulent, stands on no better footing than such fraudulent donee himself; nor can the deed of such purchaser have any other or greater effect than the deed declared to be fraudulent, except such purchase was for a valuable consideration and without notice of the fraud attempted to be perpetrated.
3. A bidder for land sold under an execution in his favor, and who received the proceeds of such sale, is not thereby estopped from showing in a subsequent and different proceeding that the land belonged to some one else other than the defendant in his execution.

CIVIL ACTION (to recover possession of a tract of land), tried before *Buxton, Judge,* Fall Term, 1873, of the Superior Court of MONTGOMERY.

Plaintiffs claimed title as purchasers at execution sale by the sheriff, under executions hereinafter fully alluded to. Their deed from the sheriff, of date 9 September, 1870, conveyed the land described in the complaint, and recited a levy and sale thereof as the property of the defendant, Aaron H. Saunders, under three executions against (271) him,—one in favor of W. A. Simmons to the use of Martha J. Simmons; another in favor of Isaac Suggs, and the other in favor of Noah Smitherman, one of the present plaintiffs. The three writs of *ven. ex.* in the above three cases, all returnable to Fall Term, 1870, were in the hands of the sheriff at the same time. Upon one, that in favor of Suggs, he makes his return of the sale of the land levied on—the same that is claimed by the plaintiff. Upon the other executions he refers to this return, adopting the same as his return on them. The land was advertised and exposed to sale by the sheriff on the Monday of Fall Term, 1870. No sale on that day for want of bidders, and the sale was postponed by public notice from day to day, for the same reason, until Friday succeeding, 9 September, 1870, when the plaintiff, Noah Smitherman, became the purchaser for the sum of $6, which the sheriff applied as far as it would go towards the payment of costs. On the same day he, the sheriff, executed a deed to the land to Smitherman and Wade, the plaintiffs, the former having assigned one-half interest in the bid to the latter, and under which deed they, the plaintiffs, claim the land from the defendant in the executions, Aaron H. Saunders, who was in possession at the day of the sale and at the commencement of this action; claiming also against the defendant, J. R. Morton, who was shown to have entered as tenant of the said Aaron. This suit at first was entered against Morton and Aaron H. Saunders alone.

Defendants except to the validity of the execution sale made by the sheriff because it was made on a Friday, whereas, by the Acts of 1868-'69, chap. 237, amended by chap. 215, Act of 1869-'70, it is required that "sales shall be made during the first three days of the term of the Superior Court of the county, or on the first Saturday in a month, and on the Monday and Tuesday next succeeding such Saturday.

The defendants then proposed to read a deed in evidence from Aaron H. Saunders to Jesse A. Saunders, dated 9 January, 1867, for the land in suit, for the purpose of (272) showing that at the date of the sale and sheriff's deed to the plaintiffs, 9 September, 1870, the title was not in Aaron, but in Jesse A. Saunders. To this evidence plaintiffs objected on the ground that as they claim as purchasers at execution sale, and had shown the defendant in the execution in possession of the land at the date of the sale, and at the commencement of this action, they were entitled to whatever interest he had in the land, even if it were merely the possession. His Honor concurred with the plaintiffs in view of the present state of the parties to the action, but suggested that the evidence would be competent if the said Jesse A. Saunders were a party. Thereupon, on motion, Jesse A. Saunders was permitted to make himself a party defendant of record to this action, and to adopt the answer already filed for the other defendants. C. C. P., sec. 61.

The deed was then read, and proof offered to the jury that after its execution Aaron H. Saunders and his tenant and codefendant, J. R. Morton, continued in the occupation of the land under an arrangement with Jesse A. Saunders. Defendants also read as evidence the record of a suit in the Superior Court of Montgomery county wherein the plaintiff, Noah

Smitherman, was plaintiff, and the said Jesse A Saunders was defendant, in which it appeared that after judgment an execution was levied on this land (the same now in dispute), and that it was sold by the sheriff, 6 August, 1870, one W. A. Strider being the purchaser, at $71. It was shown that at this sale by the sheriff, Smitherman, the plaintiff in the execution, and plaintiff in this proceeding also, bid for the land. The price was paid to the sheriff, who handed it to Smitherman. No sheriff's deed was exhibited.

In regard to this transaction, the defendants insisted:

1. That Smitherman, by levying on the land as the property of Jesse A. Saunders, and endeavoring at the sale to purchase the same, is estopped from treating the land in this suit as the property of Aaron H. Saunders; especially as he received the proceeds of sale when the same was (273) sold under execution against Jesse A. Saunders.

2. That Strider, the purchaser, having paid his bid, is entitled to call for a deed from the sheriff at any time, and therefore has an equitable interest in the land, which renders it necessary that he should be a party to this suit.

The *bona fides* of the deed from Aaron H. to Jesse A. Saunders was attacked by plaintiffs, who introduced evidence tending to prove that it was fraudulent and inoperative so far as the creditors of the grantor were concerned; that the grantee, Jesse A. Saunders, was the son of Aaron H. Saunders, who was largely indebted beyond his ability to pay when he executed the deed; that he, Aaron, conveyed most of his other property to his other sons; that he superintended the re-conveyance and adjustment of the property among themselves; and that Jesse A. Saunders subsequently left the State, leaving his father and family on the land.

Defendants, in support of the deed to Jesse A. Saunders, offered evidence tending to prove that a full consideration passed in property, money and services rendered by Jesse A. to his father, who both also swore that the transaction was fair and honest, with no purpose to defraud any one.

In reply to the above, the plaintiffs introduced two deeds from Jesse A. Saunders to his brother, Romulus, one for one hundred acres of the land, conveyed to him by his father, and the other for two and a half acres of the same tract, contending that the whole was a family arrangement, entered into to defraud creditors; that although there was a consideration expressed in each of the deeds, none was actually paid.

Upon the introduction of these two deeds to Romulus F. Saunders, dated before the sheriff's deed to the plaintiffs, the defendants contended as a third proposition that the plaintiffs having shown the title to the 102½ acres to be out of Jesse A. Saunders before the date of the deed of the sheriff, could not recover that portion of the land conveyed to Romulus F. Saunders; and that he, Romulus, ought to have a day in court.

(274) His Honor reversed the several points of law raised, and submitted this issue to the jury:

"Was the conveyance from Aaron H. Saunders, to his son, Jesse A., a *bona fide* conveyance for a valuable consideration, without the purpose on their part to defraud, hinder or delay the creditors of the said Aaron?"

This issue the jury found in favor of the plaintiffs by responding in the negative.

Upon the points reserved his Honor was of opinion:

1. That the sale of the sheriff was not invalid because of its taking place on Friday, especially as such sale had been advertised for Monday and been postponed from day to day until Friday. Defendants excepted.

2. That the plaintiff, Noah Smitherman, on account of his sale of the land in a suit against Jesse H. Saunders, and his bidding thereat, was not estopped from afterwards buying the same at a sale of the sheriff as the property of Aaron H. Saunders. Defendants again excepted.

Neither did his Honor think that any such relation was established between Strider and the plaintiffs as rendered him a necessary party because of the fact that Strider had purchased at execution sale against Jesse A. Saunders, and had paid the amount of his bid without taking a deed from the sheriff. Defendants excepted.

3. As to the legal effect of evidence offered by the plaintiffs, to-wit, the deeds to Romulus F. Saunders, his Honor was of opinion that the effect of these deeds depended upon the fact whether the said Romulus was a *bona fide* purchaser from Jesse A. Saunders, without notice of the fraud established by the verdict of the jury; and that this fact could not be determined adversely to Romulus, so as to defeat the

conveyances, without giving him an opportunity of defending his rights. As this had not been done, and as the existence of the *prima facie* title had been brought to the notice of the Court by the plaintiffs themselves, his Honor was of opinion, and so decided, that they were precluded from recovering in this action that portion of the land con- (275) veyed as above set out to Romulus F. Saunders. To this ruling the plaintiffs excepted.

Defendants moved for a rule for a new trial; granted, and rule discharged. Judgment for plaintiffs for all the land claimed, except the portion conveyed by Jesse A. to Romulus F. Saunders. From this judgment defendants (and plaintiffs) appealed.

Pemberton and *Neil McKay*, for appellants.
Battle & Sons, *contra*.

PEARSON, C. J. Appeal by defendants. Motion for *venire de novo* for error:

1. Because his Honor erred in ruling that the sale made by the sheriff on *Friday* of the first week of the term of the Court was valid.

We concur in the conclusion of his Honor. The exception rests upon the construction of the Act of 1869-'70, chap. 215, "Sales (of land) shall be during the first three days of the term of the Superior Court," etc. If the bidding had not been opened until Friday of the first week of the term it may be that the sale would not have been held to be valid, but the bidding was opened on Monday of the term, and the sale was postponed by public announcement from day to day for the want of bidders until Friday. So in contemplation of law the sale was made on Monday of the term. This view is not only supported by common sense, but is settled by many cases in our courts to support the title of purchasers at sheriffs' sales on the distinction between things relating to the *power* of the sheriff, and things only directory in regard to which he may be sued for damages, as for not advertising "in two or more places," etc., purchasers not being required to see to matters of mere detail.

2. The finding of the jury "that the deed executed by Aaron Saunders to his son, Jesse Saunders, was not *bona*

fide, but was fraudulent and done with purpose to de-
(276) fraud his creditors, disposes of the other points made in the case on the part of the defendants; for how can Romulus F. Saunders, who claims under Jesse, the fraudulent donee, stand upon fairer ground than he does, except as a purchaser for valuable consideration and without notice of the fraud attempted to be done by the said Jesse and his father, the defendant Aaron? There was no evidence of his being an *innocent purchaser.*

3. The motion that because Smitherman, one of the plaintiffs, made a bid for the land when it was offered for sale under an execution in his favor as the property of Jesse Saunders, who now stands convicted as a fraudulent donee of a dishonest debtor, he is, on the idea of an equitable estoppel, not to be allowed to show the truth, and that in fact the land, as against the creditors of Aaron Saunders, continued to be his property, is so much at variance with all sense of justice that it cannot be entertained for a moment. Had Strider, who bought the land when it was sold as the property of Jesse Saunders, instituted proceedings on the ground that he was misled and injured by the fact that Smitherman bid for the land, a question might have been presented as in *Williams v. Mason,* 66 N. C., 564.

But as the matter now stands, Strider is not in the case. He has never taken a deed for the land, and if any inference can be drawn from the verdict of the jury, the omission to do so was by reason of the fact that Jesse Saunders, under whom he derived title, was not a *bona fide* purchaser.

Our conclusion is that none of the exceptions of the defendants are well taken, and that the motion for a *venire de novo* was properly refused.

PER CURIAM. Judgment affirmed.

Cited: Colgrove v. Koonce, 76 N. C., 366; *Mayers v. Carter,* 87 N. C., 148; *Saunders v. Lee,* 101 N. C., 7; *Odom v. Riddick,* 104 N. C., 521; *Jones v. Asheville,* 116 N. C., 819; *Byrd v. Byrd,* 117 N. C., 525; *Cox v. Wall,* 132 N. C., 738; *Morgan v. Bostic, Id.,* 748.

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C. C. WADE and NOAH SMITHERMAN v. AARON SANDERS and others.

1. A purchaser at a sheriff's sale, as against the defendant in the execution who withholds possession, is entitled to recover as of course; and the debtor cannot justify his act of refusing to give up the possession on the ground of the title being in a third person.
2. Parties, who are necessary, and who not.

This is the same as the preceding case, in which the facts are fully stated. In the preceding the appeal of the defendants is considered; this comes up upon the appeal of the plaintiffs.

Battle & Son, for appellants.
Pemberton and *Neill McKay, contra.*

PEARSON, C. J. Appeal by plaintiffs. An action is instituted by a purchaser at sheriff's sale against the defendant in the execution to recover possession of the land and damages for withholding it. The right of the plaintiff to have judgment, as a *matter of course,* has been long settled by the cases in this State. But, notwithstanding this well-established principle, the counsel of the defendant offered to read in evidence a deed by which the debtor purported to convey the land to his son, Jesse A. Sanders, prior to the sale made by the sheriff.

His Honor, instead of rejecting the evidence and directing a verdict for the plaintiffs, as a matter of course, complicates the case by a suggestion that if the son was made a party the evidence would be admitted; thereupon Jesse A. Sanders is made a party defendant. This was objected to on the part of the plaintiffs, but was allowed by his Honor on what is in the opinion of this Court a misconception of the true meaning and purpose of section 61, C. C. P., to which he makes reference.

We can see nothing in that section which leads to the conclusion that it means to expunge the well-settled rule of our Courts, "a purchaser at sheriff's sale, *as against the defendant in the execution who withholds possession,* is entitled to recover *as of course,* and the debtor cannot justify (278) his act of refusing to give up the possession on the ground of title in a third person."

It is true the wording of this section is very broad, "any person may be made a defendant who claims *an interest in the controversy* adverse to the plaintiff." We are of opinion his Honor erred in supposing these words to mean "any person who claims an interest in *the thing* which is the subject of controversy." This distinction makes all the difference in the world, for the controversy between the plaintiffs and the original defendants, Noah Sanders and his tenant, Morton, was in regard to the possession of the land, and any claim which Jesse Sanders set up to the land was outside of this controversy and could not in any manner be affected by the judgment in this case under the maxim *"res inter alias acta."* So Jesse Sanders had no concern with this controversy as constituted by the summons and complaint, and making him a defendant resulted in a complication not necessary for the determination of the controversy involved by the case as at first constituted. Had the complaint used demanding judgment for the possession of the land and damages for withholding it; also, demanded judgment that the deed by the debtor Aaron to his son Jesse should be cancelled on the ground of its being a cloud upon the title of the plaintiffs, then Jesse would have had an interest in the controversy and would have been a necessary party, but, as the action was on the part of a purchaser at sheriff's sale against the defendant in the execution to recover possession of the land, the construction of his Honor of section 61, C. C. P., that any outsider may be made a party defendant, and by force of his alleged claim of title change the controversy made by the action into another controversy in regard to the *bona fides* of a deed, is a latitude of construction for which we find no warrant in the books. The other clauses of section 61 are mere corrollaries of the first clause, and show our construction to be right, and the only one that can be made at all consistent with the due administration of justice.

(279) The verdict convicting Jesse A. Sanders of fraud puts a "quietus" on him, and, as might have been supposed, on any person deriving title under him; but his Honor, still leaning on section 61, C. C. P., refuses to give the plaintiffs judgment, except for the part of the land not conveyed

by two deeds of Jesse to Romulus Sanders. That is one question.

We do not concur in the ruling of his Honor, but we approve of his fairness in stating the case so as to give the plaintiffs a "status" or "standpoint" upon which to move to modify the judgment.

We have not been able to perceive the force of his Honor's reasoning in regard to the legal effect of the two deeds of Jesse to Romulus Sanders, or how the legal effect of the deeds could be at all affected by the fact that the "existence of this *prima facie* title had been brought to the notice of the Court by the plaintiffs themselves." Had the plaintiffs demanded judgment that these two deeds be cancelled in order to remove a cloud from the title, then Romulus F. Sanders would have been a necessary party; and although the deed from Aaron to Jesse was deemed void, still Romulus would be allowed to protect his title by showing that he was a *bona fide* purchaser, for valuable consideration, without notice of the fraud that vitiates the deed to Jesse; but the *onus probandi* would have been on him, and *prima facie* his title would be affected by the same infirmity. It is sufficient, however, to say no such judgment was demanded, and the existence of these two deeds, whether brought to the notice of the Court by the plaintiffs or in any other mode, cannot have the legal effect to deprive the plaintiffs of their right to demand judgment for the possession of all of the land, leaving to Romulus the privilege of asserting his title hereafter unaffected by the judgment in this case.

The judgment will be modified so that the plaintiffs may have possession of all of the land embraced by the sheriff's deed, and the plaintiff will have judgment for costs.

PER CURIAM. Judgment accordingly.

Cited: Abbott v. Cromartie, 72 N. C., 295; *Phillips v. Johnston,* 77 N. C., 228; *Cecil v. Smith,* 81 N. C., 288; *Peebles v. Pate,* 86 N. C., 440; *McDonald v. Morris,* 89 N. C., 101; *Peebles v. Pate,* 90 N. C., 354; *Bryant v. Kinlaw, Id.,* 340; *Temperance v. Aston,* 92 N. C., 589; *Merrill v. Merrill, Id.,* 665; *Garrison v. Cox,* 99 N. C., 482; *Kornegay v. Steamboat Co.,* 107 N. C., 117; *Emry v. Parker,* 111 N. C., 264.

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D. A. and L. W. HUMPHREY, executors, etc., v. R. W. WADE, executor, and others.

1. The jurisdiction conferred on our former courts of equity by the ordinance of 23 June, 1866, in favor of creditors following assets into the hands of fraudulent alienees, is concurrent with that given to courts of law by chapter 46, sections 44 *et seq.*, Rev. Code.
2. Statutes which merely give affirmative by jurisdiction to one Court do not oust that previously existing in another Court.

(*Barnwell v. Threadgill*, 40 N. C., 86; *Carr v. Fearington*, 63 N. C., cited and approved).

THIS WAS A MOTION to dismiss a bill pending in this Court. The facts in relation thereto and which are pertinent to the decision of the Court are fully stated in the opinion of *Justice Settle.*

Smith & Strong, for the plaintiff.
Battle & Son and *Hubbard*, for defendants.

SETTLE, J. This is a bill in equity (under the old system), founded upon section 17 of the Ordinance of 23 June, 1866, which declares "that any creditor attempted to be defrauded as set forth in section 1, chapter 50, Revised Code (which is the Statute of 13 Eliz.), may, without obtaining judgment at law, file his bill in equity, and said Court is hereby authorized and empowered to direct proper issues to be made up and tried, and to make such orders and decrees as to right and justice may appertain; and said proceeding shall not affect the creditor's right to proceed at the same time at law."

The plaintiffs, as executors of William Humphrey, deceased, charge that one Robert White, being indebted by bond to their testator in the sum of $3,471.50, fraudulently conveyed his property, both real and personal, with small exceptions, to the defendants, Saunderlin and Venters, with intent to hinder, delay and defraud creditors, and they seek to subject the same to the satisfaction of the debt due the estate of their testator.

At January Term, 1871, of this Court, certain
(281) issues were made up from the pleadings and ordered to be sent to the Superior Court of Onslow, to be sub-

mitted to a jury. These issues have never been tried, but the defendants now move to dismiss the bill for want of jurisdiction.

The learned counsel for the defendants, bowing to the authority of *Carr v. Fearington,* 63 N. C., 560, admits that this bill could be maintained against a living creditor; but he says that as Robert White, the debtor, died before the filing of this bill, the case is altered; and that as the Act of 1846 (Revised Code, chap. 46, sec. 44, *ch. seq.*) gives as complete a remedy at law as could be obtained in equity, the jurisdiction of a court of equity is, of course, excluded.

Frauds and trusts are peculiarly the objects of equity jurisdiction; and although the relief sought may possibly have been under the Act of 1846, *supra,* yet that remedy is only cumulative and does not oust the jurisdiction of equity to follow assets into the hands of volunteers or fraudulent alienees.

It is said, in *Barnwell v. Threadgill,* 40 N. C., 86, in answer to the suggestion that a bill ought not to lie, because the statute gives a remedy at law, "that is but a cumulative legal remedy, not so effectual in many cases as that in equity, where accounts may be taken, all parties in interest brought before the Court and the decrees enforced, not only by execution, but by process for contempt.

"Besides, the rule of construction is settled that statutes which merely give affirmatively jurisdiction to one Court do not oust that previously existing in another Court.

"There is nothing incongruous in concurrent jurisdictions, and therefore that of the Court of Equity, or of the higher courts proceeding according to the course of the common law, is never taken away but by plain words or as plain intendments."

This case is cited with approbation in *Oliveira v. University,* 62 N. C., 69. The motion to dismiss is not allowed. The issues heretofore approved by this Court must be submitted to a jury.

PER CURIAM. Motion dismissed.

Cited: Humphrey v. Ward, 74 N. C., 785.

(282)

J. R. ERWIN, assignee, v. L. H. LAWRENCE and others.

A suit that has abated by the death of the principal in a sheriff's bond cannot be revived against the sureties when the original summons was never served on the sureties.

CIVIL ACTION, tried before *Moore, Judge,* July (Special) Term, 1873, MECKLENBURG Superior Court.

The defendants, sureties on the official bond of a deceased sheriff, file affidavits denying that the summons in this case was ever served on them. His Honor found the allegations to be so and dismissed the proceedings, when the plaintiffs appealed.

The facts of this case are stated in the opinion of the Court

Wilson & Son and *Brown,* for appellant.
H. W. Guion and *Vance & Dowd, contra.*

READE, J. The writ issued against Lawrence and his sureties upon his official bond as sheriff, and service was acknowledged by Lawrence; but there was no service upon the defendants, who were his sureties. Lawrence died, and after the suit had abated as to him and discontinued as to the defendants a summons was issued to the defendants to make them parties in that suit which had *been,* but which was then *out of existence.*

We considered whether we could not treat the summons to the defendants as an original summons and treat the complaint as a new complaint against them, or else allow a complaint to be filed and the action go on. But the objection is that it would subject them to costs which have accumulated in a case in which they were not parties, and besides it might deprive them of some advantages which they would have in a new suit.

PER CURIAM. Judgment affirmed.

(283)

BURROUGHS & SPRINGS and M. N. HART v. THE BANK OF CHARLOTTE.

The assignee of non-negotiable or dishonored notes (such as bank bills protested for non-payment) takes them subject to all equities against his assignor, whether he knows of them or not.

(*Martin v. Richardson,* 68 N. C., 255, cited and approved).

CIVIL ACTION, tried before *Moore, Judge,* July (Special) Term, 1873, of MECKLENBURG Superior Court, upon the following case agreed:

A. M. N. Taylor was indebted by note to defendant, and to pay off the same purchased certain bank bills emitted by the defendant, the Bank of Charlotte, which bills are the same as herein sued on; that Taylor paid for these bills sixty cents on the dollar, and in order to raise the money therefor he made a note to the First National Bank of Charlotte, depositing the bills as collateral security on 29 May, 1860, of $2,280. This note remained unpaid for about twelve months, Taylor in the meantime becoming insolvent and unable to take up his note due to the First National Bank. This bank was about to sell the bills deposited with it for collateral, when Taylor agreed with the plaintiff Hart to sell him the bills, he (Hart) agreeing to take up Taylor's note in the First National Bank by substituting his own therefor. This was done 24 June, 1870, the bank assenting to the arrangement. This note of the plaintiff had since been paid. Taylor had paid ten cents in the dollar on the amount of his purchase of said bills, the fifty cents thereof remaining unpaid was to be paid from the proceeds of his note given to the First National Bank. At the time Taylor sold the bills to Hart, he (Taylor) was indebted to the Bank of Charlotte, the defendant herein, to an amount about equal to that of said bills, which debt was then due; that payment of these bank bills had been demanded of the Bank of Charlotte, and the same protested for non-payment; that whilse these bills were deposited with the First National Bank as collateral, Taylor told the cashier of (284) the Bank of Charlotte, the defendant, that he controlled some of their bills, with which he expected to settle his indebtedness to them; that he (Taylor) never had the control of the notes sued on, but that they were deposited with J. H. McAden of the First National Bank, from whom Taylor purchased them, agreeing with that bank that the bills should be retained as collateral security for his own note, as above set forth.

The plaintiffs, Burroughs & Springs, advanced the money to pay off Hart's note to the First National Bank, and received the said bills as collateral security for their debt due from Hart, and still claim a lien on the same.

Hart, at the time of his purchase of the said bank notes herein sued upon, was aware of Taylor's indebtedness to the defendant, the Bank of Charlotte, upon which he was a surety, and had no knowledge of any other indebtedness; that he (Hart) is the exclusive owner of said bank notes, subject to the lien stated; that the bank notes or bills were payable to bearer.

That since the institution of this suit, Hart, under an order of Court, has applied $2,908.67 and interest of said protested bank bills (which were sealed up in a package) in payment of his liabilities to the Bank of Charlotte, the defendant, as surety of Taylor, which debt had been reduced to judgment; and the notes or bills which Hart seeks to recover in this action, amounting to $1,630, is the residue of said protested bills. The debt of Taylor to the Bank of Charlotte is unpaid, and has been reduced to judgment (January Term, 1872), amounting to $1,924.35 and interest.

If the Court is of opinion that the indebtedness of Taylor is a set-off against the demand of the plaintiffs, then judgment is to be rendered in favor of defendant; otherwise for the plaintiff.

His Honor, being of opinion for the plaintiffs, gave judgment accordingly, from which defendant appealed.

(285) *Wilson & Son,* for appellant.
Jones & Johnston, contra.

Rodman, J. This action is brought to recover on certain bills issued by the defendant.

The defense is that the bills sued on were, when the suit was brought and for some time before had been, in fact, the property of Taylor, who was a debtor to the bank, and who agreed to apply them in payment of his debt to the bank, and the bank agreed to receive them; and the defendant demands judgment that the debt of Taylor be set off against plaintiff's demand on the bills.

It will probably be admitted that if Taylor had retained the interest in the notes sued on, which he acquired on his purchase from McAden, the set-off pleaded would have been a good answer to the action to the extent of his interest. Now, what was Taylor's interest? It was what might be left after the payment of his note to the First National Bank for which the bank bills were pledged as collateral. The purchase and the pledge were parts of one transaction. As the bills were bought for sixty cents in the dollar, and Taylor paid in cash ten cents, his estate may be taken for the present to have been one-sixth. Taylor assigned all his interest to Hart. But Hart is not said to have paid any consideration beyond assuming the payment of Taylor's debt to the First National Bank, and Burroughs & Springs paid no more when they purchased from Hart.

The question, then, is, did Hart take Taylor's one-sixth free from its liability to be set off by Taylor's debt to the defendant? The answer alleges that Taylor agreed with the defendant that the bank bills should be set off against his debt, and the case states that Taylor purchased them for that purpose, but it does not clearly state that he agreed with the defendant to that effect. If it had, the case would have resembled *Martin v. Richardson*, 68 N. C., 255. The case states, however, that while Taylor owned an interest in the bank bills, he told the cashier of the defendant bank that he (286) owned some of its bills, with which he expected to pay off his indebtedness. We think we must presume that the defendant acceded to the offer, and thus the case is brought within *Martin v. Richardson*. It makes no difference that Hart had no knowledge of Taylor's indebtedness on the debt now pleaded by the defendant. The rule is that an assignee of non-negotiable or dishonored notes (as the bank bills sued on were) takes them subject to all equities against his assignor, whether he knows of them or not. Consequently, Hart took Taylor's estate (supposed, for convenience, to be one-sixth), subject to the defendant's right of set-off against Taylor. As to the other five-sixths, he was not the assignee of Taylor, who never had any beneficial interest in that share, but of the First National Bank.

For convenience of discussion, we have assumed Taylor's interest in the bills at one-sixth. His real interest, however, is what may remain after the bills are converted into money or their value in money ascertained and the lien which the First National Bank had is paid off to its assignee. The bills taken out by Hart for the purpose of paying his debt as surety for Taylor are, for the purpose of ascertaining Taylor's interest in the remaining bills, to be counted among them. Those bills were applied by Hart in his own exoneration, and such payment cannot impair the right of the defendant to have the entire interest of Taylor set off against his debt to it.

Judgment reversed and case remanded to be proceeded in, etc.

PER CURIAM. Judgment reversed.

Cited: Burroughs v. Bank, 72 N. C., 614.

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(287)

SAMUEL P. SMITH v. JAMES D. McILWAINE.

1. A plaintiff being examined in his own behalf, and swearing that the defendant promised to pay a certain debt, the defendant swearing that he made no such promise, both witnesses being of equal credibility, is not entitled to have the jury charged by the Court that as a rule of evidence, the positive testimony was entitled to *more* weight than the negative testimony.
2. Such rule is subject to so many exceptions as not to be of much practical use; and if carelessly administered, may work much mischief.

(*Henderson* v. *Crouse,* 52 N. C., 623, cited and approved.)

CIVIL ACTION (for the recovery of a promissory note), tried before *Moore, Judge,* July (Special) Term, 1873, of the Superior Court of MECKLENBURG.

The defendant made a note for $400, payable to one . . . . ., who assigned it for value to H. B. Williams. After the assignment Williams was declared a bankrupt, and his assignee transferred the note to the plaintiff for value. The defendant, after the assignment to the plaintiff, was also adjudicated a bankrupt, and has been regularly discharged.

The plaintiff, examined as a witness, testified that after defendant had been declared a bankrupt he met him in Charlotte and informed him of his having purchased the note, which he exhibited to defendant at the time; and that the defendant, remarking it was a just debt, promised to pay it, though he could not pay it on that day; that this conversation occurred before the date of the defendant's discharge.

The defendant, as a witness, swore that no such conversation ever took place as that testified to by the plaintiff, but that he (the defendant) positively refused to pay the note.

The plaintiff's counsel asked the Court to charge the jury that where two men of equal credibility testified, the one that a certain conversation took place between them, and the other testified that no such conversation did take place, that, as a rule of evidence, the affirmative testimony is entitled to more weight than the negative. (288)

His Honor declined so to charge; but instructed the jury, with respect to verbal admissions, such as those testified to, they should be received with great caution. The Court read from Greanleaf the rule applicable to the evidence introduced, as follows: "With respect to all verbal admissions, they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself, either being himself misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say. But when the admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature."

His Honor then charged the jury that the promise to bind the defendant must be a distinct and unequivocal promise to pay, notwithstanding his discharge in bankruptcy. His Honor then read the case of *Early v. Kelly,* as to the nature of the promise required to bind the defendant; and charged the jury that if they believed the plaintiff's account of the transaction was correct, they should find a verdict for him; if they believed the defendant's account was correct, they should find a verdict for him. And that on the whole case, unless the plaintiff should satisfy them by a preponderance of evidence, he could not recover.

There was a verdict for the defendant. Judgment and appeal by the plaintiff.

McCorkle & Bailey, Jones & Johnston and *Dowd,* for appellant.

Wilson & Son; contra.

(289) READE, J. The plaintiff swore that the defendant, after he had been declared a bankrupt, and before his discharge, acknowledged the plaintiff's debt, which was preexisting, to be due and promised to pay it. And this was in a conversation between him and the defendant. The defendant swore that he had made no such promise.

The plaintiff asked his Honor to charge the jury that "as a rule of evidence, the positive testimony was entitled to more weight than the negative testimony." His Honor declined the charge, and the defendant had a verdict.

It is laid down as a general rule that positive testimony is to be believed rather than negative testimony. *Henderson v. Crouse,* 52 N. C., 623; but it is subject to so many exceptions as not to be of much practical use; and if carelessly administered may work much mischief. An illustration of the rule would be this: A swears that he was at church on Sunday and that B was there. C swears that he was there also, and that B was not there. A is to be believed rather than C because A might have seen B there, and C might not have seen him although he was there. In this way the testimony is reconciled without attributing corruption to either of the witnesses. But suppose A swears that B was at church, and B is introduced as a witness, and swears that he was not there. Is A to be believed rather than B upon the idea that his testimony is positive and that the testimony of B is negative? Of course not. It would seem to be the other way. It is scarcely possible that B can be mistaken. Failure of memory alone could account for his mistake. But A's mistake might be accounted for in many ways—his memory might be at fault, he might have confounded one time with another; mistaken some other person for B, etc. So here, the plaintiff swears he had a certain conversation with the defendant in which defendant promised to pay him a debt; the defendant swears there was no such conversation and that he made no such promise. As to whether there was a conversation they would seem to stand on equal footing. For aught that we can see, the imagination of the plaintiff was as apt to create the fact as the memory of the defendant was (290) to lose it. And admitting that there was a conversation, then as to whether the defendant made the promise would seem to depend more upon the defendant's testimony than the plaintiff's. The plaintiff may have misunderstood what the defendant said; or, if he understood his words, he might have misunderstood his meaning. The defendant was as apt to remember what he said, and certainly much more apt to know what he meant. And when to this is added the fact that the defendant was at that very time trying to get clear of the debt, it would seem that his Honor was very well justified in refusing to apply the general rule to this particular case.

His Honor charged the jury that "with regard to verbal admissions, such as those testified to by the plaintiff, they ought to be received with great caution." And then he read from Greenleaf on Evidence, where that is laid down and the reason given for it.

The objection to this charge, as we understood the plaintiff's counsel, was not so much that it was wrong as a principle of evidence, as that, in this case, it was one-sided; that he ought also to have cautioned the jury against the defendant's statement. The answer is that the defendant had not made any statement detailing the admissions or declarations of the plaintiff, or of the conversation between him and the plaintiff. He simply denied that there was any such statement. So that the rule would have been inapplicable if applied to the testimony of the defendant. His Honor said nothing to reflect upon the character of the plaintiff. His remarks were as to the character of such evidence by whomsoever given in. We think the case called for the caution which his Honor gave the jury. But if we were doubtful of that, still we would not have the verdict disturbed, because it is manifestly right.

The plaintiff's prayer for instructions admits that the plaintiff and defendant are "of equal credibility." They were the only witnesses examined. The scales were (291) therefore, even. The plaintiff could not recover without a preponderance. The defendant was entitled to a verdict.

There is no error. Judgment here for the defendant for cost.

PER CURIAM. Judgment affirmed.

ALICE PEARSON and others v. RICHARD A. CALDWELL.

1. The presiding Judge, under the old equity practice, might or might not submit issues to a jury as he saw fit, and might sustain or disregard the finding of the jury on such issues as he thought best.

2. A guardian who, in 1862, exchanged North Carolina six per cent. bonds for North Carolina eights, when his wards were of full age, who afterwards received the semi-annual interest on such bonds, and gave the guardian their receipt for the same when the bonds were turned over to them, is not responsible for the same, though they were lost by the results of the war.

(*Gibbs v. Gibbs*, 61 N. C., 471, cited, approved and distinguished from this).

CIVIL ACTION, tried at the August (Special) Term, 1873, of the Superior Court of ROWAN, by *Albertson, Judge.*

The suit was originally commenced by bill (in 1866) in the former Court of Equity for Rowan County, and thence regularly transferred.

Upon the hearing, his Honor being of opinion with the defendant dismissed the action. From this judgment plaintiffs appealed.

The facts are stated in the opinion of *Justice Rodman.*

J. H. Wilson, for appellants.
Fowle, contra.

RODMAN, J. Before considering this case on its merits, it will be proper to notice a point made by the (292) counsel for the plaintiffs, who contend that there was error in the judgment because the Judge did not submit issues of fact to a jury but decided them himself. The action was a bill in equity begun in 1866. In 1870, on motion of defendant, the Judge ordered that the issues of fact be submitted to a jury, but this does not appear to have been done. Under the old system it is clear that in an equity case the Judge was not bound to submit issues to a jury, and if he did he might disregard their finding. This case being governed by the former practice, we think the Judge committed no error in disregarding the order he had made for a jury and in trying the issues himself.

The case, as stated by the Judge, is substantially this: In May, 1858, the defendant became guardian of Sophia, Alice, Charles and John Pearson, infants. He received notes and money belonging to them, and soon after his appointment, purchased for them four six per cent. bonds of the State of North Carolina, of the par value of $1,000 each, amounting to $4,000. No complaint is made of this investment.

In September or December, 1862, the defendant exchanged these bonds for North Carolina eight per cent. bonds issued during the war to a like amount. These bonds, of course, became worthless by subsequent events.

The several wards became of age as follows: Sophia in 1858, Alice in 1860, Charles in 1862; but whether before or after the exchange of bonds above spoken of, does not appear.

John died in 1864, being still an infant.

Before proceeding to the facts which constitute the remaining part of the defense, it will be convenient to pause here and inquire whether the defendant had made himself responsible to the plaintiffs by his dealing with their property.

If at the date of the exchange of the bonds in September, 1862, the defendant had been the guardian of the plaintiffs, inasmuch as he had made the exchange in good faith, and it cannot be said to have been grossly (if at all under the circumstances then existing), imprudent or injudicious, we should be bound to hold, under many decisions of (293) this Court since 1866, that he did not make himself personally liable for any loss which occurred by means of the exchange.

As John was then an infant, and the defendant was authorized as his guardian to act for him, he is protected by the principle of our former decisions from any liability to his representative on that account.

Two (or perhaps three) of defendant's wards had come of age before the exchange, which we must suppose was known to the defendant. From that moment he ceased to be their guardian, and it was his duty in a reasonable time thereafter to have put them in possession of their property as he held it at that time. If he retained it, it was not as guardian but as an agent (constituted such by their acquiescence in his retaining it), to keep for their benefit until demand and then to deliver it to them. The defendant's authority not being derived from the law of guardians is not measured by it. He had no authority but what was given him by his principals. If they gave him no authority to make the exchange, either prior thereto or by ratification afterwards, he must be held responsible for all the damage resulting from his unauthorized act. This view is supported by the case of *Gibbs v. Gibbs,* 61 N. C., 471. In that case the defendant as guardian of plaintiff held a note against one Adams, who was solvent. About two years after plaintiff came of age, viz., in November, 1863, the defendant collected the note in confederate money, which he held until it became worthless, and this Court held him liable for the loss.

We consider, then, that as to Sophia and Alice, and perhaps as to Charles (depending on the date of his becoming of full age), the defendant became liable at the date of the exchange of bonds for the value of their shares of the six per cent. bonds then given up, unless it appears that the exchange was made with their assent or was subsequently assented to and ratified by them.

We proceed now to consider the remaining question, (294) viz., whether the plaintiffs, being of full age *sui juris,* have ever, in a way and under circumstances to make it binding on them, assented to and ratified the exchange and released the defendant from the consequences of it? It is not alleged that the defendant ever consulted with any of the plaintiffs, or with their mother with whom they lived, respecting the exchange of bonds before the exchange was made. It does appear, however, from the finding of the Judge, that he afterwards informed Mrs. Pearson of it, and that he paid her as agent of the plaintiffs, semi-annually, the interest on the six per cent. bonds while he held them, and the interest on the eight per cent. bonds, after he acquired them, up to March, 1865. It must be inferred from this that he informed her of the exchange soon after it was made, and she so states in her deposition. The plaintiffs lived with their mother, and she appears to have been their agent to receive their income from the defendant. It can scarcely be doubted, therefore, that the plaintiffs were informed of the exchange soon after it was made. They were then not merely *sui juris,* but of an age which qualified them to judge intelligently of the act and of their rights, and they expressed no dissent, either at the time or afterwards, until shortly before the bringing of this action in 1866, but continued knowingly to receive the eight per cent. interest until the close of the war.

On 19 May, 1865, the defendant delivered to Mrs. Elizabeth Pearson the four eight per cent. bonds and then received from Sophia, Alice and Charles (John having previously died) a receipt under their seals in full for what was due them on the estate of their father, Giles Pearson.

The defendant exhibited no account of his guardianship at this time, but no importance can be attached to that, inasmuch as it is not claimed that he then had anything in his hands received as guardian besides these bonds. The Judge finds "that there was no deception or undue means employed to obtain the receipt, and that it was the voluntary act of the plaintiffs."

It cannot be doubted that if defendant had consulted with plaintiffs (they being of full age) before the exchange of bonds, and they had authorized him to make it, his defense would have been complete. But a subsequent ratification of the act of an agent differs from a prior authority only in this: it must appear to have been given upon full knowledge of the facts and circumstances and without any concealment on the part of the agent. Here there could be no concealment of any fact, for all the facts connected with the bonds of North Carolina were of public notoriety, and if (295) the plaintiffs were not, in fact, advised of them at the time when they were informed that the exchange had been made, they had ample opportunity to be so informed before they executed the release. Possibly if the release stood by itself, although there do not appear to be any suspicious circumstances attending it, yet it might require to be looked at with a certain amount of suspicion, upon the general policy of the law concerning settlements between guardian and ward. But taken in connection with the apparent assent of the plaintiffs to the exchange, continuing for two years or more, we think the release must be allowed to have its full legal effect.

We concur with his Honor that the action must be dismissed.

PER CURIAM. Judgment affirmed.

S. B. ALEXANDER and others v. WILLIAM JOHNSTON and others.

The successor of a former Clerk and Master, who received bonds given for the purchase of certain lands sold by the former, collected the same and misapplied the proceeds, is liable therefor on his official bond, although there was no order for the former Clerk and Master to hand over such bonds to him.

CIVIL ACTION, tried before *Moore, Judge,* at the July (Special) Term, 1873, of MECKLENBURG Superior Court.

(296) The defendants demurred to the complaint of the plaintiffs upon the grounds stated in the opinion of the Court. His Honor overruled the demurrer and the defendants appealed.

All the facts pertinent to the point decided are set out in the opinion of the Court.

McCorkle & Bailey, for appellants.
Jones & Johnston, contra.

SETTLE, J. One Dunlap, as Clerk and Master of the Court of Equity for Mecklenburg County, sold under an order of the Court certain lands for partition among the plaintiffs and took bouds for the payment of the purchase-money.

The sale was confirmed by the Court, and the Clerk and Master was ordered to collect the purchase-money and make title.

These bonds then passed into the hands of Dunlap's successor, A. C. Williamson, who collected the money due thereon and misapplied the same by converting it to his own use. This action is brought against the sureties on the official bond of Williamson for the recovery of the money thus misapplied, and comes before us by appeal from the order of his Honor overruling the demurrer to the complaint and directing the defendants to answer.

The principal cause of demurrer assigned is, "that it appears from the complaint that the order of sale was made prior to the appointment of said Williamson as Clerk and Master, and it does not appear that there was any order made directing Dunlap, the former Clerk and Master, to turn over the said notes to said Williamson to collect the purchase-money," etc.

It appears that there was an order for the Clerk and Master to collect; and it is too clear for argument that Williamson received the bonds and also the money due upon them in his official capacity, and that the plaintiffs have a right to look to his bond for indemnity.

The judgment of the Superior Court is affirmed.

Let this be certified.

PER CURIAM. Judgment affirmed.

(297)

H. H. MITCHELL, administrator, and others, v. F. D. WOOD.

An intestate sells B a tract of land for $800, putting him in possession and giving him a bond to make title when the purchase-money is paid; B pays part and refuses to pay the balance of the purchase-money. A, the administrator, sues B, demanding, first, a rescission of the contract; second, a writ of possession; and third, damages: *Held*, that he is entitled to neither, but that he was entitled to a judgment for the unpaid balance and to a sale of the land if such judgment is not satisfied.

(*Butner v. Chaffin*, 61 N. C., 497, cited and distinguished from this).

CIVIL ACTION, tried before *Logan*, *Judge*, at Fall Term, 1873, of the Superior Court of RUTHERFORD County.

The plaintiff, H. M. Mitchell, administrator of W. L. Mitchell and others, his heirs at law, brings this suit, alleging that on 8 January, 1868, his intestate and their ancestors sold to the defendant a house and lot for $800, giving him a bond to make title when the purchase-money and interest was paid; the purchase-money, to-wit, $800, was payable in installments, the last being due 1 January, 1870. That there is still due of said purchase-money $400 and interest, which defendant refuses to pay, etc. Wherefore, they demand judgment:

1. That the contract of sale of said land be rescinded and declared void.
2. That the Court grant plaintiffs a writ of possession.
3. That they have judgment for $50 and costs.

Defendant admits the material allegation in the complaint, and demurs to plaintiff's demand for judgment, as being illegal, etc.

On the trial several issues of fact and law were submitted; and the former being admitted by the pleadings the latter was disposed of, his Honor granting judgment in favor of the administrator for the amounts still due on the notes given for the purchase of the lands, and refusing to grant a writ of possession. From this judgment plaintiffs appealed.

L. W. Barringer and *Gray,* for appellants.
J. C. L. Harris, contra.

PEARSON, C. J. The allegations of the complaint (299) make a plain case for the specific performance of a contract to sell land. These allegations are submitted, and the only difficulty grows out of the fact that the plaintiffs, instead of demanding judgment for the balance of the purchase-money, and an order to sell the land in case such balance was not paid, demand judgment:

1. That the contract be rescinded.
2. For a writ of possession.
3. For damages for withholding the possession.

The plaintiffs had no right to demand judgment for either of these particulars:

1. There is no ground on which the Court can rescind the contract.

2. In order to enforce its performance there is no reason why the plaintiffs should be put into possession, inasmuch as they do not elect as vendors, holding the title as security for the purchase-money, to take possession and account for the rents and profits in discharge of interest and principal, and there is no allegation of a demand of the possession and notice to quit, as in *Butner v. Chaffin,* 61 N. C., 497, but elect to close the contract by enforcing payment of the balance of the purchase-money, as mortgagees seeking to foreclose.

3. They are not entitled to damages by way of rents and profits, for a vendee or a mortgagee who is let into possession receives the rents and profits, in lieu of the interest for which he is liable. But because the draughtsman of the complaint was under a misapprehension as to the relief to which the plaintiffs are entitled, it does not follow that they are not entitled to relief according to the case made by the *allegata et probata,* and are to be put off simply with a judgment upon the note for the unpaid part of the purchase-money, under which they could not sell the land. *Camp v. Cox,* 18 N. C., 52.

The judgment will be modified by adding: In the event that the amount is paid into the Clerk's office by the defendant, or is made by the sheriff and paid into office with the return of the execution, the plaintiff, H. H. (300) Mitchell, as administrator, will file a deed in the office conveying the land in fee to the defendant, the deed to be approved of by the Clerk before the money is withdrawn from the office.

In the event that the amount is not paid, and the sheriff having the execution cannot make the money, then he will sell the land to satisfy the execution, and the excess, if any, pay over to the defendant. As the judgment is modified, the costs of this Court will be taxed against plaintiffs and defendants, each to pay one-half.

PER CURIAM. Judgment accordingly.

BYNUM, J., did not sit.

DEEP RIVER COPPER COMPANY, of Baltimore, Md., v. B. F. MARTIN.

Where judgment has been obtained in an attachment against a company, upon a fraudulent demand, sued by a wrong name, and having no notice of the action, such judgment should be set aside and the company allowed to plead, although the same was known by one name as well as another.

MOTION (after due notice) to set aside a judgment obtained at Spring Term, 1868, heard before *Cannon, Judge,* at Fall Term, 1863, of ROWAN Superior Court.

The defendant in this action had issued an attachment against the plaintiff under the name of the "Deep River Copper Mining Company," founded upon a note given to him by his brother, who claimed to be the agent of the company. In this proceeding the company allege that they were sued by the wrong name; that they had no notice of the suit, and that the debt upon which the same was brought is fraudulent, the pretended agent having no authority to contract a debt (301) against the company. His Honor, upon the hearing below, found the following facts:

1. That the true name of the corporation is the "Deep River Copper Company of the city of Baltimore," and not the "Deep River Copper Mining Company."

2. That the land was levied on under the attachment, and publication made thereof in the wrong name.

3. That the Deep River Copper Company of the city of Baltimore had no knowledge of the attachment, nor publication made in the cause, nor of the judgment rendered, until after its rendition and within twelve months of making this motion.

4. That the note sued on in that action was given to the plaintiff therein by one W. A. Martin, a brother of the said plaintiff, who claimed to be an agent of the company, and that the alleged consideration thereof is not just and true, or at least is so suspicious as to make it proper that the corporation should have an opportunity to contest it.

A further fact is stated by consent, "that the company was as well known by the one name as by the other."

Therefore, it is ordered by the Court that the judgment in the action of attachment aforesaid be vacated, and that the "Deep River Copper Company of the city of Baltimore" have leave to appear, plead or demur, as said corporation may elect to do, and to that end the said original cause is ordered to be reinstated on the civil issue docket.

From which judgment the defendant herein appealed to the Supreme Court.

L. M. McCorkle, for defendant, filed the following brief:

The statement of the case shows that the company was as well known by one name as the other. The Judge below, in finding what was the company's real name, and finding no further when the pleadings admitted that what the Judge had found was erroneous, it was his duty to decide whether the fact of its being as well known by one name as another affected the motion made.

As the company was as well known by one name as (302) the other, the action was well brought, and the reason thereof is because a service in this name is notice to the defendant of the pendency of the action.

The misname of a corporation is immaterial when the name given sufficiently designates the corporation. Angel & Ames Cor., sec. 647, and cases there cited.

It is a sufficient answer to a plea of misname that the party was equally well known by either name. *Selma v. Shackleford,* 17 Georgia, 615; *Jones' Estate,* 27 Penn. St., 336.

When the name of a corporation consists of several words, the transposition, alteration or omission of some of them may not be regarded as important *if it is evident what corporation* is intended. *Chadsey v. McRusy*, 27 Ill., 253.

There can be no difference, legally, between a personal service of process and the service by publication, as in our case, the object of either being to bring the defendant into Court.

2. The Judge below erred in not finding the facts which are alleged to constitute surprise and negligence; he only found as a fact that the real name of the corporation was that which no one disputed. *Griel v. Vernon*, 65 N. C., 76; *Powell v. Weith*, 68 N. C., 342.

As the company was as well known by the used name as the real one, it constituted neither surprise nor excusable neglect, and it was its duty to have appeared at the return term and answer the action of plaintiff.

If the above view be correct, then it is too late for defendant to object to the form of the affidavit made in the attachment. The publication was full, and it is also too late to inquire into the justness of Martin's claim against the company. The defendant had full notice of the pendency of the attachment, and, having failed to avail himself of any defense that he then had, it is too late now to assert any defense.

(303) *Bailey, contra,* cited and relied upon the case of *Powell v. Weith*, 68 N. C., 342.

BYNUM, J. The case states that the plaintiff was as well known by one name as the other, but it is found as facts that he had no notice of action against him, and that the claim on which the judgment was taken was fraudulent. And although it may be true that the party sued was as well known by one name as the other, it is a strong circumstance against the defendant that the note on which he sued out his attachment was given by the agent of the company, a brother of the defendant, who necessarily must have known the true name of his principal. The company should have an opportunity of contesting the claim.

There is no error.

PER CURIAM. Judgment affirmed.

JOSEPH UTLEY and others v. JAMES M. FOY and others.

1. A penal bond, conditioned to make title to land when the purchase-money is paid, may be assigned and an action for damages for the non-performance of the condition brought by the real party in interest.

2. In such suit a note given to one of the parties to induce her to perfect the title by submitting to a private examination is not a set-off or counter-claim.

3. If an appellant fails to assign and prove an error, the judgment, although erroneous, must be affirmed.

CIVIL ACTION, tried before *Buxton, Judge,* Spring Term, 1873, of CUMBERLAND Superior Court.

The material facts of the case are:

In October, 1862, the defendants executed a penal bond in the sum of $20,000, payable to John A. Williams, conditioned to make title to him for 747 acres of land (304) in Cumberland County (which land had descended to the defendants on the death of their ancestor, Stewart Devane), Williams agreeing to pay therefor $10,000, the payment secured by notes due 1 April, 1863, 1864, 1865 and 1866.

The notes for the purchase-money were all paid in confederate money, and on 19 May, 1866, the defendants, together with the wives of two of them, executed to Williams a deed for the land, with warranty, reciting a consideration of $10,000.

On 12 December, 1866, Williams conveyed the land by deed of mortgage to the plaintiff, Utley, to secure a debt; and on 5 April, 1869, he sold the equity of redemption to the plaintiffs, Charles J. and James F. Williams, at the same time assigning to them the penal bond for title executed by defendants, the assignment being in writing, as an additional security to the title made by him to the plaintiffs.

This bond for title had not been surrendered by John A. Williams to the defendants at the time he obtained his deed of 19 May, 1866, because two of the *feme covert* defendants, who had joined their husbands in signing the deed, had not been privately examined; and when called on for that purpose both refused, for the reason that the land had been paid for in

Confederate money. One of them, Mrs. Foy, however, in consideration of John A. Williams giving her husband another note, payable in two years, for an additional sum of $300, compromised the matter and perfected the deed, so far as she was concerned, by undergoing a private examination. The other *feme covert* defendant, Mrs. Wright, persisted in her refusal to undergo a private examination, and in August, 1869, instituted a suit for partition against the plaintiffs, and, obtaining a final decree, had her one-sixth of the land set apart to her.

The value of the land in currency is $8 per acre. Mrs. Wright recovered eighty-nine acres and was besides awarded $159.50 for equality of partition, which sum was paid by plaintiffs.

The defendant insisted:

(305) 1. That the bond for title executed by defendants in October, 1862, being a penal bond and payable to John A. Williams, was not assignable, but that the legal title remained in John A. Williams and did not pass to the plaintiffs; consequently, if this action was maintained at all, it should have been brought in his name.

2. Defendants were entitled as a set-off or counter claim the note for $300 which had been given by Williams to Foy for Mrs. Foy's interest in the land, which note was then held by one of the defendants, which he was willing and now proposed to set off for the joint benefit of all the defendants, agreeing that it should be considered for that purpose the joint property of them all.

There was a verdict for the plaintiffs, subject to the opinion of the Court, upon the points presented by defendants. His Honor, holding the points so raised not to be well taken, refused to disturb the verdict, and gave judgment accordingly, from which judgment defendants appealed.

W. McL. McKay, for appellants.

B. & T. C. Fuller, contra, cited C. C. P., sec. 87; *Martin v. Richardson*, 68 N. C., 257; Waterman Set-off, etc., secs. 226 to 230.

RODMAN, J. 1. There is nothing in the first exception of the defendants. Before C. C. P. choses in action were not assignable at law, but in equity they were. Since (306) the adoption of The Code, an action must be brought by the real party in interest. The plaintiffs as assignees are entitled to sue.

2. As to the right to be allowed the counter claim. In October, 1862, the defendants and William T. Devane, being tenants in common of certain lands (Foy and Wright in right of their wives), entered into a bond to John A. Williams, conditioned to be void if they should convey to him a good title of the land. As the bond is not set forth it cannot be said whether it was joint or several—that is, whether all of the obligors were bound for each and all, or whether each was bound for himself only and in respect to his own share. The parties in the pleadings have treated it as a joint bond, and we must take it to be so.

No question is made as to the right of the plaintiffs to recover damages by reason of the failure of defendants to make title to Mrs. Wright's share. It does not appear whether or not the jury embraced in their verdict the damages sustained by Williams by reason of the failure of the defendants to make a good title to the share of Mrs. Foy, so that in order to get her title he was compelled to give his note to her husband for $300. The parties have made no point on the amount of the damages recovered. The defendants plead as a counter claim the note which John A. Williams made to Foy in order to induce his wife to consent to make the deed. This note was given on 25 February, 1867, payable in two years, and on 12 March, 1867, was endorsed to W. S. Devane. If John A. Williams had sued the defendants immediately after the making of this note, it is clear it would not have been a set-off:

First, because not due; and second, because to have allowed it as such would have been to distribute amongst all the defendants what was the individual property of Foy. Its endorsement to W. S. Devane, who is no party to this suit, could not make it a set-off. And although the Judge, in stating the contentions of the defendants' counsel, says that he urged as a reason why the note should be a set-off that Devane had agreed that it might be used as such for the bene- (307) fit of the defendants, yet the case does not state such agreement as a fact, or that defendants were ready and able to surrender the note at the trial. If the note would not be a set-off against Thomas A. Williams, certainly it is not against the plaintiffs. The defendants have shown no error in the record. And it must be remembered that if the appellant fails to assign and prove an error, the judgment, although it *may* be erroneous, must be affirmed. *He* makes up the case, or if he permits the Judge to do it, the Judge does it as his agent. It is still his case, and it is presumed that he has fully and distinctly set forth every ground of exception. All uncertainties and omissions are taken most strongly against him.

PER CURIAM. Judgment affirmed.

Cited: Paschall v. Bullock, 80 N. C., 9; *White v. Clark,* 82 N. C., 8-11; *Mason v. Pelletier,* 82 N. C., 44; *King v. Ellington,* 87 N. C., 574; *Mott v. Ramsey,* 90 N. C., 30.

LEWIS WEBB v. COMMISSIONERS OF THE TOWN OF BEAUFORT.

Where a debt against a municipal corporation has been reduced to judgment in a Court of competent jurisdiction, a peremptory *mandamus* may be properly asked for, although such judgment is dormant.

(*Lutterloh v. Commissioners of Cumberland,* 65 N. C., 403, cited and approved).

CIVIL ACTION, tried at Fall Term, 1873, of the Superior Court of CARTERET County, before *Clarke, Judge.*

Plaintiff alleges that at February Term, 1861, of the Court of Pleas and Quarter Sessions of Carteret County, he recovered against the defendants a judgment for $300 principal money and $33.90 interest and costs; that an execution thereon issued, under which, from the sale of the market-house and certain lots in the town of Beaufort, there was raised $12, which was applied to the payment of the (308) original and subsequently accrued costs in the suit; that the defendants owned no other property out of which the judgment could be collected; that no part of the principal and interest of said judgment has been paid; whereupon the plaintiff demands judgment that a peremptory writ of *mandamus* be issued, commanding the "commissioners of the town of Beaufort" to pay or cause to be paid to the plaintiff or his attorney the sum of $333.90.

Defendants demurred to this complaint, on the ground that the judgment of the Court of Pleas and Quarter Sessions in favor of the plaintiff and against the defendants, set forth in the pleadings, was, and had been for many years, dormant.

His Honor gave judgment in favor of defendant and dismissed the complaint, and the plaintiff appealed.

Hubbard, for appellant.
Green, contra.

READE, J. When the demand, in this case the debt, of the plaintiff is ascertained by the judgment of a court of competent jurisdiction, a peremptory *mandamus* may be asked for. *Lutterloh v. Commissioners,* 65 N. C., 403. This would probably not be controverted, but the demurrer is upon the ground that the judgment which ascertained (309) the plaintiff's debt is dormant. Take that to be so; still a dormant judgment is evidence of indebtedness, and of the amount of indebtedness, just as well as a judgment not dormant, and may be enforced as well, but not in the same way—the one by execution, the other by action to revive. If the plaintiff's judgment were alive, he would have no remedy to enforce it by execution, because the defendant has nothing which an execution can reach. And as he would have to resort to the present remedy by *mandamus,* there is error in sustaining the demurrer and dismissing the action.

Let this be certified.

PER CURIAM. Judgment reversed.

B. L. and JOHN M. PERRY, executors, v. THE MERCHANTS BANK OF NEW BERN, CAROLINA NATIONAL BANK, of Columbia, S. C., and A. T. JERKINS.

1. In a suit between two banks for the recovery of $19,331 it is agreed by the debtor bank to pay one-half of said debt and interest in cash, and to satisfy, pay and discharge the balance by paying over to the other fifty per cent. of its assets as they are collected and as may be sufficient therefor, the creditor bank agreeing to accept such payment and agreement as to the remainder, in "full satisfaction, payment and discharge of the suit, and of all matters controverted therein or appurtenant": *Held,* that this agreement was in effect an assignment of one-half the assets of the debtor bank as a security for its remaining indebtedness.
2. *Held further,* that such assignment, not being registered, was void against a creditor of the bank making the assignment, and that the creditor acquired a lien on the choses in action assigned as soon as the Court below condemns them to his use.

(*Smith v. Washington,* 16 N. C., 318; *Lindsay v. Wilson,* 22 N. C., 8, cited and approved).

(310) PROCEEDINGS supplemental to execution, heard before *Moore, Judge,* at chambers, EDGECOMBE County, 24 November, 1874.

The defendants having heretofore appealed to the Supreme Court (see same entitled case, 69 N. C., 551), and the case having been remanded in order that an account should be taken, and for other purposes, it is now moved that the Carolina National Bank, of Columbia, S. C., be made a party, which is permitted, and that the counsel of the parties have leave to file the following agreed statement of facts, which is done, to-wit:

"By consent of parties, the account ordered in the cause by the Supreme Court of the amount due the Carolina Bank by the Merchants Bank, and of the value of the assets of the Merchants Bank, is waived; and it is admitted that one-half of the assets of the Merchants Bank, inclusive of the Jerkins note, is insufficient to pay the balance due the said Carolina Bank."

The plaintiffs, upon the foregoing statement, moved for judgment that the respondent, A. T. Jerkins, be ordered to pay to the plaintiffs so much of his indebtedness to the defendant, the Merchants Bank of New Bern, as shall be sufficient to pay the judgment of the plaintiffs.

The Clerk, being of opinion that the facts admitted presented a question of law, refused the motion and transmitted the proceedings to the Judge, who, upon consideration, declares that the plaintiffs are entitled to the Jerkins debt as against the Carolina National Bank, and gave judgment that Jerkins pay to the plaintiffs so much thereof as shall be sufficient to satisfy their judgment.

From the above judgment the Carolina National Bank appealed, assigning as grounds:

1. That the assignment of the Merchants Bank of New Bern to the Carolina National Bank is a valid transfer of the debt due said bank by the defendant Jerkins as against the plaintiff of one-half of said debt.

2. That the private stockholders of the Merchants (311) Bank, who made the advance of $2,000 towards the cash payment to the Carolina Bank, are entitled to be reimbursed out of the other half of said debt due by Jerkins.

Merrimon, Fuller & Ashe, for appellants.
J. L. Bridgers, Jr., contra.

RODMAN, J. When this case was before us at June Term, 1873 (69 N. C., 551), it was assumed as conceded that the agreement between the Carolina National Bank and the Merchants Bank was intended as an assignment of one-half of the assets of the latter to the former as a (313) security for the residue of the debt, amounting to over ten thousand dollars.

It is now contended, apparently for the first time, that the agreement was intended to be, and was in effect, an absolute assignment of one-half of what the Merchants Bank should collect of its assets to the Carolina Bank in consideration of a discharge and release of the debt from the former to the latter, which was released by the agreement, the evidences of debt being left with the Merchants Bank as a co-owner and as agent for the Carolina Bank as to its half. On the other side it is contended that the agreement did not assign any part of the evidences of debts held by the Merchants Bank, but only the one-half of the proceeds of those debts when they should be collected, which would be a mere personal executory contract on the part of the Merchants Bank, in nowise binding on its other creditors.

It is certainly difficult to say what was the intention of the parties, and we regret that the points were only suggested and not fully argued.

The language of the agreement seems almost studiously vague and cloudy.

After reciting that the Carolina Bank had sued the Merchants Bank in the Circuit Court of the United States to recover $19,331 on notes issued by the Merchants Bank, and that the parties had agreed to "settle said suit, with all the matters controverted therein, or appurtenant," the Merchants Bank agreed to immediately pay the Carolina Bank one-half the debt and interest, "and to satisfy, pay and discharge *the remainder of said indebtedness* by *paying over* to the Carolina Bank, as the same shall be reasonably collected, fifty per cent. of so much of all the assets of the Merchants Bank *as may be sufficient therefor:* provided," etc. And the Carolina Bank "agrees to accept the said payment, and the agreement just hereinbefore mentioned, in full satisfaction, payment and discharge *of said suit, and of all matters therein* (314) *controverted or appurtenant,"* and to dismiss the suit. The agreement then proceeds to release the stockholders from individual liability.

We are of opinion that the Carolina Bank did not intend to release its debt against the Merchants Bank and to take either the agreement of that bank or the assignment of the half of its assets in payment of the debt. The Merchants Bank is to pay its remaining indebtedness by *paying over* the half of what it may collect until the debt is paid; but when enough shall have been collected and paid over to pay the sum remaining due, no more is to be paid. This, taken with the cautious language of the subsequent release, is conclusive that an absolute assignment of one-half the assets was not intended, for in that case the Carolina Bank would have been entitled to continue to receive half the collections after its debt was paid, and although the amount might have greatly exceeded its debt. The language of the releasing clause seems carefully to avoid releasing the debt. The Carolina Bank accepts the agreement "in payment of the suit" (not of the debt sued for) "and of all matters therein controverted." We do not know what matter was controverted, and if the Merchants Bank had, in pleading in that suit, denied its liability upon the bills sued on, the phrase would be an exceedingly awkward and round-about way of releasing that liability. The phrase "and appurtenant" probably refers only to the costs. When the intention is to release the stockholders it is clearly and directly expressed, which shows that the parties knew how to use appropriate terms to express their intentions.

We think that the parties intended the agreement to have effect as an assignment of half the assets of the Merchants Bank as a security for its remaining indebtedness.

Whether by reason of its being not a direct assignment of the assets, but only an executory personal covenant to pay over when collected, it would, had it been duly registered, have had effect as an assignment as to creditors and purchasers without actual notice, we think it is unnecessary to determine. For we have no difficulty in saying that if we regard it as a direct and actual assignment of the (315) evidences of debt, yet, not having been registered, it is void as to the plaintiffs. *Smith v. Washington,* 16 N. C., 318.

The defendant then contends that the plaintiff has acquired no estate or lien to which the law gives a preference in the particular debts of Gooding and Jerkins, and as between two assignees, neither of whom has a legal estate or lien to which the law gives a preference, equity will give priority to the first in time. For this he cites *Lindsay v. Wilson,* 22 N. C., 8.

The principle is admitted. The only question is whether in this case the law does not give the plaintiff a preferable lien.

The Act of 1868-'9, chap. 148, sec. 1 (Bat. Rev., chap. 17, sec. 261), enacts that no execution shall be a lien on the personal property of the defendant as against *bona fide* purchasers for value, or against other executions, except from the levy. As the Carolina National Bank released the personal liability of the stockholders of the Merchants Bank, it was a purchaser for value. But as the assignment was a security only and was not registered, it was still void as against the plaintiffs, as we have seen. Now, at what time did the plaintiffs acquire any lien upon the debts owing by Gooding and Jerkins?

The debts, being choses in action, were incapable of an actual seizure by the sheriff, and as by the C. C. P., sec. 264, and the following, they were made liable to execution by analogy, the lien must be held to have been acquired when the plaintiff did what appropriated the debts to his judgment, as a levy would have appropriated tangible property. It may be that this appropriation was made by service of process on the debtors under section 266, C. C. P., but as we are not required to decide on this point, we refrain from doing so. We think, at least, an appropriation was made and a lien acquired when the Superior Court directed the debts of Gooding and Jerkins to be applied to the plaintiff's judgment.

The plaintiff had certainly then done what was equivalent to a levy. The case cited, therefore, does not apply; (316) the equities of the parties are not equal, for as against the plaintiffs the National Bank of Carolina has no equity and the plaintiff has a lien at law. It is just as if a debtor had made a mortgage of tangible goods which was not registered when they were levied on under execution.

PER CURIAM. Judgment affirmed.

E. J. ASTON v. J. M. CRAIGMILES.

1. In our practice the Judge below is not required to recapitulate the testimony given in on a trial before him a *second* time, although one of the parties may request it to be done.

2. It is no ground for a new trial that the defendant's counsel made a mistake in admitting in the answer the existence of a certain contract, which mistake was not discovered until after the trial, and his Honor did right in refusing it.

(*State v. Lipsey*, 14 N. C., 485; *State v. Harvey*, 19 N. C., 390; *Bailey v. Poole*, 35 N. C., 404, cited and approved).

CIVIL ACTION on a stated contract, tried at July (Special) Term, 1873, of BUNCOMBE Superior Court, before *Albertson, Judge*.

In his complaint the plaintiff alleged that the defendant owed him a commission of five per cent. upon the sale of a certain tract of land, amounting to $375, according to the terms of a written contract, fully set out in the complaint.

The contract was admitted in the answer, but it was therein charged that it had been rescinded and ended several months before the sale of the land upon which commissions are claimed.

Upon this issue thus raised by the pleadings the parties went to trial.

His Honor stated the evidence to the jury and charged that if they should find that the contract had been rescinded or revoked by the parties, the plaintiff could not recover.

As the jury was about to retire, the case states, the (317) defendant asked the Court to instruct the jury that if they found the contract had been rescinded they should find for the defendant. His Honor remarked that the instructions asked for had been given, and again gave the charge, but without again repeating the testimony in the case.

The jury returned a verdict for the plaintiff, and the defendant moved for a new trial upon the following grounds, to-wit:

1. Because the Court failed to recite the testimony upon the rescission of the contract a *second* time when his Honor's attention was called to it.

2. The defendant alleged, and offered to make affidavit, that his counsel had made a mistake in admitting in the answer the contract as set up in the complaint to have been made by the defendant; that the agent of the defendant, one Atkinson, had no authority to make such a contract for him, but one of a different nature, and that he had never authorized the contract named in the complaint or assented to the same, though Atkinson had made the contract as charged. Defendant also offered to make affidavit that the mistake was not discovered by him until after the trial of the case.

There was no intimation of any such defense, or of the existence of such a state of facts, until after the trial was over, and it was mentioned for the first time upon the motion for a new trial; and the defendant's exception to the charge of the Court was first taken when the motion was made.

The Court refused the motion for a new trial, and gave judgment in accordance with the verdict, from which judgment defendant appealed.

Fuller & Ashe, for appellant.
J. H. Merrimon, contra.

READE, J. The first exception to his Honor's charge is that he failed to recite the testimony upon the rescission of the contract a *second time,* when his attention was called (318) to it.

It is the duty of the Judge "to state in a full and correct manner the evidence given in the case." Rev. Code, chap. 31, sec. 130. But he need state only such parts and so much as is necessary to aid the jury in passing upon the issues submitted. *State v. Lipsey,* 14 N. C., 485; *State v. Haney,* 19 N. C., 390; *Bailey v. Poole,* 35 N. C., 404. All this we are to assume his Honor did; indeed, it is stated in the case that he did. The exception that he did not recapitulate the testimony a *second* time is of the first impression in our practice. The exception is not favored.

After the verdict for the plaintiff, the defendant moved for a new trial upon the ground that his counsel had made a mistake in admitting in the answer that such a contract ever existed, and that he had not discovered the mistake until after the trial. This he offered to show by his own affidavit. His Honor refused a new trial, and the defendant excepted. If the alleged mistake had been satisfactorily proved, still his Honor might well have refused a new trial in the exercise of his discretion, because mistakes or want of skill or other faults of attorneys in the management of cases are not always excusable and must usually be at the expense of *their* clients, and not of the clients on the other side. And certainly it was considerate in his Honor in this case not to rely upon the proffered affidavit of the defendant himself, after he had admitted in his answer that there was such a contract, but alleged that it had been rescinded, and upon the trial made no issue except upon the rescission. We do not think it necessary to enter into the discussion of the question whether the refusal to grant a new trial for the cause assigned was discretionary with his Honor, or whether we can review him, because, if discretionary, it is fatal to the defendant, having been exercised against him, and, if subject to our review, we agree with his Honor.

There is no error. Judgment will be entered here for plaintiff.

PER CURIAM. Judgment affirmed.

(319)

HENRY REIGER v. COMMISSIONERS OF THE TOWN OF BEAUFORT.

The commissioners of a town, authorized to subscribe to the capital stock of a corporation upon its being so voted by a "majority of the voters of said town qualified to vote for commissioners," are justified in subscribing the amount voted if a majority of the votes cast at the election held for that purpose be in favor of such subscription, although a majority of *all* the voters of the town did not vote.

CIVIL ACTION to recover a bond issued by the corporation, commenced in a justice's court and carried by appeal to the Superior Court of CARTERET County, from whence it was removed to the Superior Court of WAKE, when it was tried at Spring Term, 1873, before *Albertson, Judge,* upon the following case agreed:

The bond upon which the suit is brought was given by the commissioners of the town of Beaufort to C. R. Thomas, president of the Beaufort Steam Ferry-boat Company under the authority granted by the provisions of the Act of 1858-'59, incorporating said company. Section 5 of that act reads: "That it shall be lawful for the commissioners of the town of Beaufort to subscribe by their agent for such an amount of stock in said company as they shall be authorized to subscribe by a majority of the voters of said town qualified to vote for commissioners, whose sense of subscribing a particular amount shall be previously ascertained by opening a poll for that purpose at such times and on such notice and in such mode as the commissioners shall direct; and the said commissioners shall have power to negotiate a loan or loans and issue the bonds of the town as security for the payment of said loan or loans, and shall be authorized to lay a tax on the lands and polls of said town for the payment of the said subscription."

On 24 February, 1859, the commissioners of the town of Beaufort ordered that the Clerk advertise at the court-house and three other public places that an election would be held at the court-house on Saturday, 26th of said month, to take the sense of the citizens as to whether the commissioners should subscribe $2,000 in addition to the subscription of $4,000 theretofore made to the stock of said company. The election was held, when sixty-two voted in favor (320) of "Subscription" and only two voted against it; whereupon the commissioners "resolved that the treasurer of the town subscribe $2,000 to the stock of the Beaufort Steam Ferry-boat Company and receive a certificate of stock therefor.

"Resolved further, that a bond or bonds, payable at twelve months, bearing interest from date and signed by a majority of the commissioners, be issued by the treasurer in payment of said subscription, and that the treasurer be authorized to sell said bond or bonds for any sum not less than ninety per cent., and that he be authorized to charge the loss on the sale of said bonds, if any, in his account upon vouchers therefor."

In pursuance of the foregoing ordinance, the bond, the same sued on in this action, was issued and assigned by C. R. Thomas, for value, to the plaintiff before it became due; and all the bonds issued by virtue of said ordinance were issued at par, and the town received therefor stock in said company of the value of the face of the bonds.

It is admitted that sixty-eight is less than a majority of the voters of said town qualified at that time to vote for commissioners.

Upon the hearing his Honor gave judgment for the plaintiff, which being certified to the Superior Court of Carteret, the defendants appealed.

Green, for appellants.
Haughton, Battle & Son and *Hubbard, contra*.

Pearson, C. J. The plaintiff is a *bona fide* holder of a bond issued by the commissioners of the town of Beaufort. The "case agreed" sets out no fact upon which a recovery can be resisted.

The town issued its bonds, received the value thereof in stock of the company, and the town cannot, as against (321) a *bona fide* holder of one of its bonds, be heard to allege that the bond is void by reason of the fact that the consent of the voters of the town had not been duly ascertained.

Indeed, we incline to the opinion that the construction contended for, to-wit, there must be a majority of all the voters of said town qualified to vote for commissioners, is too narrow, for the act goes on to provide, "whose sense of subscribing a proposed amount shall be previously ascertained by opening a poll for that purpose, after advertisement," etc. The meaning of which is that all of the voters of the town who do not choose to attend at the poll are to be taken as assenting to the result of the election according to the votes actually polled. This is the usual course. The commissioners acted upon it and issued the bonds. If the intention was to add a further restriction, there ought to have been an express proviso that the assent of the voters of the town can only be given by a vote of a majority of all of the voters of the town to be actually polled.

Here the assent of the voters of the town is left to be ascertained by *opening a poll after due advertisement*, etc., which of course is left to depend upon the majority of the votes cast at such election.

No error.

PER CURIAM. Judgment affirmed.

Cited: Railroad v. Comrs., 72 N. C., 490; *Norment v. Charlotte*, 85 N. C., 389; *McDowell v. Construction Co.*, 96 N. C., 529.

(322)

ISAAC W. JONES v. CHARLES F. WAGONER, Sheriff.

A rule on a sheriff to show cause why he has not obeyed the mandate in an execution and sold certain land and the reversionary interest therein is well answered by showing that the land had been assigned as a homestead and by pleading the Act of 1870-'71, forbidding the sale of the reversionary interest, and the rule must be discharged.

(*Crummen v. Bennett*, 68 N. C., 494, cited and approved).

APPLICATION for a *mandamus*, heard by *Cloud, Judge*, Fall Term, 1873, of the Superior Court of ROWAN.

In his complaint the plaintiff alleges that at January Term, 1872, of Rowan Superior Court he recovered a judgment against one Styres; that on 3 July, 1873, he caused an execution to issue on such judgment, which came regularly into the sheriff's hands. Plaintiff further alleges that at the time the judgment was docketed Styres owned in fee a tract of land in said county of sixty-nine acres or thereabouts; that in September following Styres and wife conveyed said tract of land to one Long for the purpose of defrauding the creditors, and that soon thereafter the plaintiff demanded of the sheriff, the defendant herein, that he should sell the land, notwithstanding the conveyance to Long; that the sheriff advertised the same to be sold, but afterwards refused to sell on account of the homestead law. Plaintiff then demanded that the reversion in said land after the provisions of the homestead were complied with should be sold, which the defendant refused.

The defendant admits most of the allegations in the answer, and states that he caused Styres' homestead and personal property exemption to be laid off, which took his land and all his personal property, and that he refused, acting under advice, to sell the reversionary right of Styres.

His Honor, being of opinion that the plaintiff had not made out a sufficient case to authorize a *mandamus,* dismissed the case, whereupon the plaintiff appealed.

(323) *McCorkle & Bailey,* for appellant, cited *Crummen v. Bennett,* 68 N. C., 494, authority for the sale of the reversion.

1. As to sale of homestead by Styres, distinguishable as in our case, the deed was by Styres and wife and privy examination pursuant to the provisions of Art. X, sec. 8, Constitution.

Craige & Craige and *Jones & Jones, contra.*

PEARSON, C. J. The question as to whether *mandamus* will lie to compel a sheriff to sell land under a *fieri facias* is waived by treating this as a rule upon the sheriff in the case of *Jones v. Styres* to show cause why he shall not be ordered as an officer of the Court to execute the writ.

Treating it in that way the sheriff shows for cause the homestead act and the act of 1870-'71, forbidding the sale of "reversinary interest" or estate after the homestead expires.

At common law *land* was not liable for debts, and a party was trusted on the faith of his personal property and the remedy was against *his body.*

The Statute of *Elegit*, 13 Edw. I., gave the creditor a right to extend the one-half of the debtor's land at a yearly valuation until the debt was discharged. Our statute of 1784 subjected land to sale. The Act of 1872 subjects trusts, estates and equities of redemption to sale under execution.

Clearly the General Assembly has power to repeal these statutes, and there could be no objection on the score of impairing the obligation of contracts, provided the repealing act was confined to debts thereafter contracted. The homestead act and the act forbidding the sale of the reversion until after the homestead estate runs out are in effect only partial repeals of the then statutes above referred to.

The debt in our case was contracted in 1872, (as we infer from the manner in which the case is stated, and from what was said on the argument), so this partial repeal of the act of 1874 does not impair the obligation of the contract sued on. The plaintiff at the time he gave the credit had notice that he could not subject the land, unless there was (324) an excess over and above the value of the homestead.

We are unable to see how the deed from Styres and wife to Long can affect the question, for supposing it to be fraudulent and void as to creditors, it cannot have the legal effect to *enlarge* the rights of creditors so as to put the homestead out of the way. *Crummen v. Bennett,* 68 N. C., 494.

We concur in the ruling of his Honor, and order "the rule" to be discharged at the cost of the plaintiff.

PER CURIAM. Judgment affirmed.

D. F. WILSON and others v. R. J. ABRAMS, administrator, and others.

1. The proper practice in a proceeding against an administrator who at the time was Judge of Probate seems to be, to make the summons returnable before him, and then, under the provisions of the Act of 1871-'72, chap. 197, transfer the whole proceedings before the district Judge, who will make the necessary orders in the premises.

2. Exceptions to the report of a referee that he adopted a former settlement as the foundation of his report; that he stated no evidence upon which he found the facts reported; that he filed no vouchers nor receipts, nor did he refer to any authorizing the disbursements reported, and that he did not state when certain judgments were obtained, are all well taken, and the report was properly set aside.

SPECIAL PROCEEDINGS (petitioner against an administrator for a settlement), tried upon exceptions to the report of a commissioner, before *Logan, Judge,* at Spring Term, 1873, of the Superior Court of POLK.

The plaintiffs are the distributees and next of kin of Charles Wilson, deceased, of whose estate the defendant, R. J. Abrams, is the administrator. The summons was returnable before the Judge of Probate, who was at the time (325) the administrator, on the 2d day of March, 1870, at which time Abrams having accepted service filed his answer. At the time the answer was put in, by order of the Court (his Honor) it was referred to R. W. Logan to take an account of the administration. The case was thereafter continued on the Superior Court docket from term to term until Fall Term, 1871, when the referee made his report, to which report plaintiffs excepted. The first six being the only exceptions considered by this Court are as follows:

1. The commissioner adopted the settlement of the administration made *ex parte* with the Court in 1860, instead of going back to the inventory and the sale list of the administrator.

2. The commissioner has not reported the evidence upon which he bases his report, neither as to receipts nor disbursements.

3. None of the vouchers and receipts allowed have been filed, numbered or referred to, so as to enable any person to see or examine them.

4. He has not stated when the confederate money on hand was collected and on what account, so as to show whether the

administrator is accountable for it in good money or otherwise.

5. He has not reported when the judgment for $1,947.90 on J. S. Ford and others was obtained.

6. Nor the judgment on the note of D. F. Wilson, $335.19, and others.

(Other exceptions omitted.)

At Spring Term, 1873, the exceptions were overruled by his Honor, and at Fall Term succeeding plaintiffs moved to vacate the order overruling the exceptions, and confirming the report for want of jurisdiction; and furthermore, that the cause be transferred to the Court of Probate of some other county in the judicial district for the reason that defendant was Judge of Probate of the county wherein the case was pending.

Both motions being refused by his Honor the plaintiffs appealed. (326)

McCorkle & Bailey and *J. C. L. Harris,* for appellants.
Schenck, contra.

READE, J. The Court of Probate has jurisdiction "to audit the accounts of executors, administrators and guardians," under the Code, subject to transfer and appeal as in other cases. See also, Const., Art. IV, sec. 17.

Where a Judge of Probate was, at the time of his election, administrator of an estate, it was supposed to be contrary to principle that he should audit an account of his own; and, therefore, the Act of 1871-'72, chap. 197, sec. 1, provides that in such case the Judge of the Superior (328) Court may make such order as may be necessary in the settlement of the estate, and may audit the accounts or appoint a commissioner to do so and report to the Judge for his approval, etc. See Battle's Rev., chap. 90, sec. 6. And when the account is approved by the Judge he shall order the Judge of Probate to make the proper record.

In the case before us the defendant was Probate Judge, and was administrator at the time he was elected. So that it is a case in which he could not audit the account, and falls under the act aforesaid, authorizing the Judge of the Superior Court to act.

The summons was returnable before the Probate Judge; but the record does not show that any action was taken by him, or that the parties moved before him, and the next we hear of the case it is before the Judge in term, and the plaintiff files his complaint and the defendant answers, and the Court refers to a commissioner to audit the accounts, who reports an account, to which exceptions are filed by the defendant which are overruled and the defendant appeals.

This is the first case of the kind that has been before us, and the practice is new. Inasmuch as the Probate Judge can not audit an account in a case where he is a party, it would seem that the summons ought to be returnable before the Superior Court Judge; but then, the Const., Art. IV, sec. 17, confers upon the Clerk jurisdiction to audit the accounts of administrators, etc., without having excepted the case in which he himself shall be the administrator. The course pursued in this case may be the most convenient solution of the difficulty: return the summons before the Clerk of Probate Judge, which answers the constitutional requirement, and then, as the Superior Court has jurisdiction by transfer or appeal, it may proceed under the Act of 1871-'72, *supra.*

There is, therefore, no force in the objection on the part of the defendant that the Judge of the Superior Court had no jurisdiction. He had jurisdiction of the subject matter—original under the act aforesaid, appellate under (329) the Constitution and the Code. And he had jurisdiction of the person by reason of the acceptance of service, and the appearance and answer, whatever may have been the irregularity of transferring the case from the Probate to the Superior Court.

The first six exceptions on the part of the plaintiff to the report of the commissioner are well taken, which show the report to be so radically defective that the account will have to be stated anew, and therefore it is not necessary that we should notice the other exceptions.

The exceptions were considered below at Spring Term, 1873; but his Honor did not deliver his opinion until after the term expired, and therefore the plaintiff had not the opportunity to appeal. This entitled the plaintiff at Fall Term to have the judgment, which had been entered as of Spring Term, vacated.

There is error. This will be certified and the case remanded, to the end that the judgment may be vacated, the exceptions sustained (the first six, the others not passed on), the report set aside and a new account ordered, and such other proceedings had as the law directs.

PER CURIAM. Judgment accordingly.

BYNUM, J., did not sit.

(330)

B. W. BELL and others v. CALEB KING, executor, etc.

1. Courts of Probate have original jurisdiction of special proceedings for the recovery of distributive shares and legacies which have not been assented to by the executor. When, however, actions for the same have been brought to regular terms of the Superior Courts, the defect is cured by the Act of 1870-'71, chap. 108 (Bat. Rev., chap. 57, secs. 425, 426).

2. An executor had no right, in the fall of 1863, to collect good notes belonging to his testator's estate and invest the proceeds in confederate bonds.

CIVIL ACTION, in the nature of a special proceeding to recover a legacy, heard by *Henry, Judge,* Fall Term, 1873, of BUNCOMBE Superior Court.

The case was referred, and the report of a referee excepted to by the defendant. His Honor, on the trial below, sustaining the exception, the plaintiffs appealed.

The facts of the case, with the exceptions to the report and the opinion of the Judge below, are fully stated in the opinion of the Court.

McCorkle & Bailey, for appellant.

J. H. Merrimon, contra, cited and relied on *Hunt v. Sneed,* 64 N. C., 176; *Heilig v. Foard, Ibid.,* 740; *Sprinkle v. Hutchinson,* 66 N. C., 450. Act of 1870-'71, chap. 108, does not apply to proceedings to recover legacies; Bat. Rev., chap. 49, sec. 119, relieves executors from liability where they receive confederate money, citing *Franklin v. Vannoy,* 66 N. C., 145, as to Amnesty Act; *Baird v. Hall,* 67 N. C., 233.

Settle, J. This was an action for the recovery of a legacy, made returnable to the regular Spring Term, 1870, of the Superior Court for Macon County, and removed by consent of parties at Fall Term, 1871, to the county of Buncombe.

(331) The first question for our consideration is one of jurisdiction.

"The Clerks of the Superior Courts shall have jurisdiction of the probate of deeds, the granting of letters testamentary and of administration, the appointment of guardians, the apprenticing of orphans, to audit the accounts of executors, administrators and guardians, and of such other matters as shall be prescribed by law." Const., Art. IV, sec. 17. Here is an express grant of jurisdiction to grant letters testamentary and of administration, and to audit the accounts of executors and administrators; but the manner of enforcing the collection of legacies and distributive shares is left to be regulated by legislation.

And this was done by the Act of 1868-'69, chap. 113, sec. 83. We have held that in every case where the Court of Probate can give an adequate remedy, the party asking it must apply to that Court; and that it has, under the clause of the Constitution and the legislation, *supra,* original jurisdiction of special proceedings for the recovery of distributive shares and legacies which have not been assented to by the executor. But since those decisions the Legislature has passed the act of 1870-'71, chap. 108, for the express purpose of curing such mistakes as the one before us. His Honor was of opinion that this act, if not unconstitutional, did not apply to actions for the recovery of legacies, since special proceedings for certain other purposes are mentioned in the act and the subject of legacies is not mentioned.

But this construction is too narrow, and would defeat many of the beneficial purposes of an act which was intended to cure defects of jurisdiction, not only in petitions and special proceedings, but also in any action which may have been improperly brought. Much of the jurisdiction of Clerks or Probate Judges has been conferred by legislation and is subject to be changed by the same. The Act of 1870-'71, *supra,* was re-enacted and enlarged on 3 March, 1873, Acts of 1872-'73, chap. 175. And it is worthy of observation that the Act of

1870-'71 has been brought forward in Bat. Rev., chap. 17, secs. 425, 426. We do not see that these acts in- (332) fringe the Constitution, and the decisions of the Court have treated the subject of jurisdiction as one to be regulated by legislation. In *McAdoo v. Benbow,* 63 N. C., 461, the *Chief Justice* in delivering the opinion of the Court says that under the provision of the Constitution which ordains that the Clerks of the Superior Courts shall have jurisdiction "of such other matters as shall be prescribed by law," the General Assembly had power to enact the Code of Civil Procedure, by which the functions of the Superior Court are to some extent divided between the Judge and the Clerk; and under this same clause the General Assembly has power to repeal, suspend, modify or change its enactments, so as to make writs of summons returnable to the regular terms of the Superior Courts. But notwithstanding his Honor held that he had no jurisdiction, he proceeded to dispose of the case upon its merits, and we think that he has erred in his conclusions of law upon the facts found and reported by the referee. It appears that the testator died in 1859, leaving a last will and testament, in which he bequeathed to the plaintiffs a legacy of two thousand dollars; that the defendant qualified as his executor, and on 25 January, 1860, sold personal property to the amount of $19,592.14, and took notes with good security therefor, payable twelve months after date; that there was cash and good notes on hand at the death of the testator, which came to the hands of the defendant to the amount of $5,042.58; that after the death of the widow of the testator in January, 1862, he sold the property which had been bequeathed to her for life, in February, of the same year, on a credit of twelve months, for the amount of $3,362.23, and that the Mills note amounted to $1,406.74, the whole amounting to $29,403.70. It further appears that the commissioners who settled with the defendant, under an order of the Court of Pleas and Quarter Sessions for Polk County, at March Term, 1864, found that he should be charged, after deducting all credits and vouchers, with the net amount of $28,498.82, and that the defendant acknowledged (333) that amount to be correct. The defendant admits that he never paid any part of this legacy. These facts, found by the referee, are not denied, and we could not fail to notice that the defendant, in his answer, contents himself with the general allegation, that "in good faith he collected all the debts due the estate, except some very small amounts in confederate money," but he does not inform us when he collected the money. We only see, from the facts found by the referee, that he collected some of it at Fall Term, 1863, of Henderson Court, and other portions of it after that time, and that he "showed a certificate for $3,000 deposited out of these funds for the benefit of the plaintiffs, and to pay their legacy, in the name of Caleb King, executor of J. King, dated 12 March, 1864." Why did he collect these good notes in the fall of 1863, and afterwards? Was it for the purpose of turning good notes into confederate scrip? There was no occasion for this collection and re-investment, that we can see, and the defendant has furnished us no good reason for so doing. We think that the whole current of the decisions in this State is against the defendant, and that he should be held responsible for this legacy. But it is objected that while the referee charges the defendant with interest he does not fix the time at which the legacy should begin to bear interest. We presume that it was intended to charge the defendant with interest from and after the date of his settlement with the commissioners, to-wit, at March Term, 1864, of the Court of Pleas and Quarter Sessions for the county of Polk; but this is not expressly stated by the referee, and the counsel for the plaintiff removes this objection by declaring his readiness to remit all interest. This certainly answers to the defendant's exception.

The judgment of the Superior Court is reversed, and judgment entered here for the plaintiff for two thousand dollars, the amount of the legacy.

Per Curiam. Judgment reversed and judgment for plaintiff.

Cited: Herring v. Outlaw, 70 N. C., 336; *Johnston v. Davis, Id.,* 581; *Bidwell v. King,* 71 N. C., 288; *Benbow v. Robbins, Id.,* 340; *Hendrick v. Mayfield,* 74 N. C., 632; *Johnson v. Futrell,* 86 N. C., 125; *Ward v. Lowndes,* 96 N. C., 377; *Lowe v. Harris,* 112 N. C., 490.

(334)
OLIVER HERRING v. JULIA E. OUTLAW, administratrix, and others.

The irregularity of bringing a suit against an administrator for the settlement of his intestate's estate in the Superior Court at term time instead of in the Probate Court is cured by sections 425, 426, chap. 17, Bat. Rev.

(See *Bell v. King, supra*).

CIVIL ACTION (in the nature of a special proceeding), tried before *Clarke, Judge,* at Spring Term, 1873, of DUPLIN Superior Court.

The plaintiff's summons was returnable before the Superior Court in Term time. Defendants demurred; assigned as a ground the want of jurisdiction. His Honor sustained the demurrer and gave judgment dismissing the action; from which judgment plaintiff appealed.

Smith & Strong, for appellant.
W. A. Allen, and *Battle & Son, contra.*

SETTLE, J. This is an action in the nature of a (336) creditor's bill, commenced in April, 1872, against the administratrix and heirs at law of B. R. Outlaw, deceased, and made returnable to the Superior Court at term time.

His Honor dismissed the action for want of jurisdiction.

Without pausing to enquire whether the action was properly brought or not, it is sufficient to say that in *Bell v. King, ante,* 330, we have held that the Act of 1870-'71, chap. 108, re-enacted by the Act of 1872-'73, chap. 175, and brought forward in Battle's Revisal, chap. 17, secs. 425, 426, does not conflict with the Constitution, and that it cures irregularities and defects in the manner of bringing actions, etc., before one Court when they should have been brought before another.

The judgment of the Superior Court is reversed, the demurrer overruled, and the case remanded to be proceeded in according to law.

PER CURIAM. Judgment reversed.

Cited: Johnson v. Futrell, 86 N. C., 125; *Ward v. Lowndes,* 96 N. C., 377; *Lowe v. Harris,* 112 N. C., 490.

STATE v. ED. SIMONS.

In an indictment for larceny, the ownership of the property stolen is charged, "one hundred pounds of cotton, the property of C, one hundred pounds of cotton, the property of G": *Held,* that the objection to the indictment on account of duplicity and obscurity would have been fatal on a motion to quash but that the defect is cured by verdict, as provided in chapter 35, sections 15 and 20, Rev. Code.

INDICTMENT (for larceny), tried at Fall Term, 1873, of RICHMOND Superior Court, to which it had been removed from Anson Superior Court, before *Buxton, Judge.*

The defendant was charged in the following indictment:

"The jurors for the State upon their oath present, that Ed. Simons, a person of color, late of the county of Anson, on 1 January, 1873, with force and arms, at and (337) in the county aforesaid, one hundred pounds of cotton, of the value of five dollars of the goods and chattels of L. H. Covington, one hundred pounds of cotton of the value of five dollars of the goods and chattels of Daniel Gatewood, then and there being found, feloniously did steal, take, and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The proof was that L. H. Covington carried several thousand pounds of his seed cotton to the gin-house of Daniel Gatewood to be ginned, and while the cotton was being ginned several hundred pounds were stolen; and the evidence implicated the defendant in the larceny.

For the defendant it was insisted that the indictment contrained but a single count in which the joint ownership of the cotton by Covington and Gatewood was alleged; and that in order to convict the defendant such joint ownership must be proved, otherwise the defendant should be found not guilty; and his Honor was asked so to charge the jury. This, his Honor declined to do. Defendant excepted.

The jury were instructed by the Court that in cases of bailment where the property bailed was taken, the ownership may be alleged to be in the general owner or in the bailee; that this indictment contained two counts, and that if either was supported by the evidence it was sufficient. To this charge defendant again excepted.

The jury found the defendant guilty. Rule for a new trial; rule discharged.

Defendant then moved to arrest the judgment, on the ground that the ownership of the property stolen was defectively stated in the indictment. Motion overruled. Judgment and appeal by defendant.

Steele & Walker, for the defendant.
Attorney-General Hargrove, for the State.

PEARSON, C. J. "It is safest to follow the beaten (338) path." According to the established forms, this indictment would have contained *two distinct* counts, one charging the cotton to be the property of Covington, the other charging the cotton to be the property of Gatewood. This mode of allegation would fit the proofs, whether the cotton, upon the evidence, turned out to be the property either of Covington or of Gatewood.

It is evident on the face of this indictment that it contains but one count. This departure from "the beaten path," gives rise to the questions presented by the record.

1. Supposing the bill of indictment to have only a single count, we do not concur in the conclusion of the counsel of the defendant that, *ergo,* the ownership of the cotton is charged as the *joint* property of Covington and Gatewood; on the contrary, the purpose is manifest to allege a *several property* in the cotton, so there is no variance between *"allegata* and *probata."*

2. The proposition laid down by his Honor that in cases of bailment the ownership may be alleged either in the general or the special owner, was conceded on the argument, and it being clear that the error of his Honor in holding that the bill of indictment contained two counts instead of a single count was wholly immaterial, except so far as the fact that an indictment containing but a single count might be liable to objection on the ground of duplicity. The case is narrowed down to that point. We have seen that the indictment cannot be taken to charge that the cotton was the *joint* property of Covington and Gatewood, so we must take it that in the same count it is charged that the defendant stole one hundred pounds of cotton, the property of Covington, and that he also

stole one hundred pounds of cotton, the property of Gatewood. If the indictment be that the stealing was done at different times and by different acts, then the indictment is defective for duplicity; but if the intendment be that the cotton of Covington and the cotton of Gatewood was stolen at the same time and by the same act, then according to the authorities cited on the argument the indictment is not defective for du-(339) plicity. Bishop on Crim. Prac., secs. 192, 193, 194, cited on the argument. For illustration, a man by one blow, strikes A and B. An indictment in our Court, charging a battery upon A and B was held not defective for duplicity. So an indictment charging in our Court that the prisoner assaulted A and B, and stole from A one shilling and from B two shillings, is not defective for duplicity *if it was all one transaction*. These are exceptional cases, and in our case there is nothing to show that the cotton of Covington and the cotton of Gatewood was stolen at the same time and by the same act, except the formal words "there and then being found, did steal," etc. The indictment is also defective for obscurity in this, it omits the conjunction "and," which is necessary to connect the specification in regard to the ownership. "One hundred pounds of cotton, of the value of five dollars, of the goods and chattels of L. H. Covington." "One hundred pounds of cotton, of the value of five dollars, of the goods and chattels of one Daniel Gatewood, did steal." etc.

This want of connection and disregard of certainty of statement cannot be set down as a clerical misprision, and ought to have been held fatal if the objection had been taken in apt time.

It is evident that only one parcel of cotton was stolen, and that the indictment was drawn as it is either to save the trouble of writing two counts or because the Solicitor for the State did not know whether to charge the cotton to be the property of Covington, the bailor, or of Gatewood, the bailee; but take it either way, the defendant is guilty of larceny, and has been convicted according to law, unless he is to be allowed to escape punishment by a refinement and nicety of distinction which does not in any way affect the merits of his case; such informalities are provided for by statute: "No indictment shall be quashed or judgment thereon stayed by reason of any informality or refinement, if in the bill sufficient matter appears to enable the Court to proceed to judgment." Rev. Code, chap. 35, sec. 15, 20.

If the objection for duplicity and obscurity had been (340) taken on a motion to quash we should have been inclined to have held the indictment defective, notwithstanding the authorities cited by Bishop, which are all exceptional cases; but as the defendant took his chances before a jury we are clear that the defect for duplicity and obscurity is cured by the statutes referred to.

No error. This will be certified.

PER CURIAM. Judgment affirmed.

Cited: State v. Reel, 80 N. C., 444; *State v. Cooper,* 101 N. C., 689; *State v. Hart,* 116 N. C., 978.

JAMES G. MOORE v. COMMISSIONERS OF ALAMANCE COUNTY.

Tickets given out by Clerks of Superior Courts in State cases are only evidence that the witnesses attended; and until the Judge by whom the case was disposed of shall pass upon the costs, including witness fees, and declare how, when and by whom such costs shall be paid, the county commissioners cannot know their liability and are not responsible therefor.

CIVIL ACTION (to recover certain witness tickets), tried before *Tourgee, Judge,* Fall Term, 1873, of the Superior Court of ALAMANCE.

The plaintiff, as assignee, sues the defendant for $454.40, the amount of certain witness tickets issued, some by the Clerk of this Court and others by the Clerk of Alamance Superior Court, alleging that the defendants as commissioners of Alamance County are responsible therefor.

The defendants demur to the complaint:

1. That it does not allege that the Judge of the Superior Court, before whom the cases were tried, in which the pretended witness tickets are charged for attendance before Hon. R. M. Pearson and others, sitting as committing magistrates, has decided that the cost should be paid by the prosecutor,

(341) the county or the State, as is required by law. Said costs being in the discretion of the said Judge, and either to be taxed or not, as he may direct.

2. That it does not allege and show that the said witnesses had received any proper tickets for their attendance upon said examination which could be a charge upon the county or any other person.

3. That there is no existing law under which the defendants can audit and order the payment of such witness tickets as are charged in the complaint for attendance upon the preliminary examination before Hon. R. M. Pearson or others.

4. That the complaint does not allege that either the tickets charged for attendance upon the examination or before the grand jury at the Court were ever charged in any bill of costs made out by the Clerk of the Superior Court of Alamance County under an order of said Court, nor that any such bill of costs was ever presented to them, nor that any order of the Judge was ever made taxing the costs in any of the alleged cases in which the defendants were discharged, and directing them to be paid by the county of Alamance as required by law.

His Honor overruled the demurrer and gave the plaintiff judgment from which the defendants appealed.

W. A. and J. A. & J. W. Graham, for appellants:

1. At common law there was no compensation allowed to witnesses in criminal prosecutions. Roscoe's Crim. Ev., 121; 2 Russell on Crimes, 641.

2. By statutes Georges II., III. and IV., remuneration was provided, first, in cases of felonies, and afterwards in misdemeanors, such as the cases in which the witnesses here are alleged to have attended. These statutes never had operation in North Carolina, and the subject is regulated here by our own acts of Assembly.

3. By the early acts (see Revisal of 1820), such claims were proved in Court and paid out of the State Treasury; but by Act of 1819 they are directed to be paid (342) by the county in which the prosecution was commenced. Rev. 1820, p. 1490. A similar provision is found in Rev. Stat., p. 125, and in Rev. Code, p. 151. In both of these last the costs are directed to be paid by the county in

which the offense under investigation is charged to have been committed.

These acts all speak of witnesses summoned or recognized to attend "in the County and Superior Courts," and do not by their terms apply to those who attend before magistrates on preliminary examinations; and the Revised Code, 141, *supra*, sec. 9, says: "In case the defendant be discharged, the Court shall order the witnesses to be paid."

An order of Court would therefore appear to be necessary before payment of witnesses is made from a county treasury; and it is not perceived that by any of the legislation down to and including the Revised Code there was provision made for payment of witnesses before an examining magistrate or a Judge acting as such.

By the Act of 1868, chap. 11, sec. 572, p. 668: "On fees of witnesses," those attending at a term of the Court, or before the Clerk or a referee, or upon any inquest or examination, have an allowance of $1.50 per day and also mileage from their places of residence to the place of examination, but the act does not settle by whom it shall be paid. But the act of the same session, chap. 178, sec. 40, p. 446, "of costs and proceedings," the Judge of Alamance Superior Court, before whom the papers should have been returned, is invested with a discretionary power to determine in each case of discharge of a defendant whether the costs should be paid by the prosecutor, the county or the State. His *allocatur* is necessary *against the county* before the defendants are liable to action on the witness tickets in question.

He should order them to be paid by the State, the proceedings having all taken place at Raleigh, sixty miles distant from the county, because the official duties of the Judges conducting them required their presence in that city. At all events, he must first determine among the three (343) parties aforesaid from whom payment may be exacted, who shall bear the burden.

Parker, contra.

READE, J. The complaint sets forth that the plaintiff is assignee for value of a number of witness tickets of sundry persons who had been summoned by the State in divers

(344) prosecutions against divers persons for divers crimes and misdemeanors, between the first day of August, 1870, and the first day of July, 1872, alleged to have been committed in the county of Alamance, of which the defendants are the commissioners. The tickets are not set out, but a list is made of them and appended and referred to. It is not set out nor does it appear where or before what Court the witnesses attended, and the inference that might not unreasonably be made that they attended the Superior Court of Alamance is rebutted by the fact that many of them are signed by W. H. Bagley, Clerk of the Supreme Court, and the remainder by the Clerk of Alamance Superior Court, who certifies that the witness did attend Court and that the several indicted were acquitted or otherwise discharged, and that the cases had terminated at the cost of the State.

It is only by inference from what is said in the demurrer that we get at the fact that the tickets signed by W. H. Bagley, Clerk of the Supreme Court, were for attendance before the Chief Justice as examining magistrate. There is no allegation of the Court in the complaint. If it be that the Chief Justice, as an examining magistrate, had these witnesses before him and authorized Mr. Bagley to act as his clerk and swear the witnesses and certify their tickets, there is no doubt about his power to do so. Act 1858-'59, chap. 279, subchap. 11, sec. 2; Acts 1868-'69, chap. 188, subchap. 2, sec. 1; Rev. Code, chap. 31, sec. 67. And the facts ought to have been alleged in the complaint in order that the Court might see that the tickets were valid.

It seems also to be necessary to the validity of the tickets that they shall be passed upon and allowed by the Judge of the Superior Court before whom the case is tried or disposed of, who has the discretion to impose the costs on the prosecutor or on the county or on the State. Acts 1868-'69, chap. 178, subchap. 2, sec. 40. And who would also have the power to disallow a ticket if it appeared that the witness had failed to attend until he was discharged (Rev. Code, chap. 35, sec. 39), or to prevent a witness in several cases on the
(345) same day from proving in more than one case (Acts 1871-'72, chap. 186, sec. 3), and to see that only half fees are charged where the county has to pay. Acts 1870-'71, chap. 186, sec. 4. From all which the necessity will appear of

having the Judge of the Superior Court, before whom the case was disposed of, to pass upon the cost, which of course includes all the witness fees therein. Until that is done, the county commissioners cannot know their liability. The tickets given out in State cases by the Clerks are only evidence that the witness has attended; but how he is to be paid is for the Judge to say.

No point is made as to whether the plaintiff, as assignee of several tickets from divers persons, can maintain his action, because, as we understood from the defendant's counsel, it was not desired to multiply costs.

There is error in overruling the demurrer. Judgment reversed and judgment here for defendant.

PER CURIAM. Judgment reversed.

Cited: Guilford v. Comrs., 120 N. C., 29.

J. J. CRUMP and others v. W. C. FAUCETT and others.

1. A died seized and possessed of real and personal estate, leaving him surviving three grandchildren by a son and five by a daughter, the son and daughter having died before A: *Held*, that under rule 3, Bat. Rev., chap. 36, the grandchildren represent their ancestors and take the estate *per stirpes* and not *per capita*.
2. And as the parties take by representation, it follows that any advancements made to the ancestors must be accounted for.

(*Clement v. Cauble*, 55 N. C., 83; *Haynes v. Johnson*, 58 N. C., 124; *Cromartie v. Kemp*, 66 N. C., 382, cited and approved).

CIVIL ACTION, in the nature of a special proceeding for partition, heard before *Tourgee, Judge,* at chambers in CHATHAM County, 15 November, 1873.

The proceedings were instituted in the Court of (346) Probate from whence it was carried by appeal by defendants to his Honor at chambers, who affirmed the judgment of the Probate Judge. From this judgment defendants again appealed.

The facts pertinent to the points decided are fully set forth in the opinion of the Court.

Howze and *Manning,* for appellants.
Headen, contra.

BYNUM, J. William Crump died intestate in 1873, seized and possessed of real and personal estate, leaving him surviving three grandchildren by a son, Joseph, and five grandchildren by a daughter, Lucinda, both of whom died before their father. Do these grandchildren inherit *per stirpes* or *per capita,* is the question.

This depends on the proper construction of the third rule of descent (Bat. Rev., chap. 36, rule 3): "The lineal descendants of any person deceased shall represent their ancestor and stand in the same place as the person himself would have done had he been living."

In 4 Kent, 379, it is said the law of Justinian adhered strictly to the doctrine of representation and gave to the grandchildren and other remoter descendants, though all the claimants were standing in equal degrees, the portion only that their parents would have taken if living. This was adhering in all cases to the doctrine of representation *per stirpes,* and the States of Rhode Island, New Jersey, North and South Carolina and Louisiana have followed, in this respect, the rule of the civic law. Thus, if A dies, leaving three grandchildren, two of them by B, a son who is dead, and one of them by C, a daughter who is dead, these three grandchildren standing all in equal degree of consanguinity to the ancestor, would take only their father's share, and consequently one grandchild would take half the estate, and the other two grandchildren the other half.

(347) Although such has been the construction of our third rule of descent by commentators, and although such is undoubtedly the construction of a similar rule in England (2 Bl., chap. 14), the precise question here has not been before this Court until now. The principle, however, has been repeatedly decided by this Court and must be adhered to as a fixed rule of property until changed by legislative action.

The question was first raised in *Clement v. Cauble,* 55 N. C., 82, in a case of collateral descent, where it was held (*Pearson, J.,* dissenting) that the rule of descent was *per stirpes* and not *per capita.* It was again before the Court in *Haynes v. Johnson,* 58 N. C., 124, when the above case was affirmed by a unanimous Court as *res adjudicata.* The latter decision was subsequent to the Revised Code, which retained the third rule as it was when construed in *Clement v. Cauble,* and was therefore considered as an affirmance of the construction as sanctioned by the Legislature. Finally, in *Cromartie v. Kemp,* 66 N. C., 382, the previous decisions are again affirmed, and in delivering the opinion of the Court *Rodman, Judge,* says: "We are now invited by the counsel of the appellants to review the principles of these decisions and overrule them. We by no means wish to be understood that if the question were an open one we should not concur with the Court in those cases. But we think the law as it was then decided is not open to doubt or discussion."

These decisions were upon collateral descent under the fourth rule, but they are equally decisions upon lineal descent under rule three, because the rules of collateral descent are "subject to the rules" of lineal descent and were so considered in the discussion. It would be impossible to adopt the rule insisted upon by the defendants of division *per capita* without overruling all our decisions and introducing a new law of property.

As the parties inherit by representation, it follows that they must account for advancements.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Draper v. Bradley, 126 N. C., 74.

(348)

ATLANTIC, TENNESSEE AND OHIO RAILROAD COMPANY v. WILLIAM JOHNSTON and others.

1. In a suit to recover damages for certain trespasses, brought by one board of directors of a corporation against another board, claiming to be the legally appointed directors of the same corporation:
2. *It was held*, first that the board *de facto* in possession of the franchises of the corporation may maintain an action for any trespass respecting the corporate property, and that the acts of such *de facto* officers cannot be collaterally impeached; the proper way of trying the right or title to the office being by an action in the nature of a *quo warranto: Held*, second, that the defendants could not justify such alleged trespasses under color of proceedings had by a justice of the peace under the provisions of the Rev. Code, chap. 49 (forcible entry and detainer), as the justice in such case had no jurisdiction.

(*Perry v. Tupper*, *post*, 538; *Navigation Co. v. Neal*, 10 N. C., 520; *Elizabeth City Academy v. Lindsay*, 28 N. C., 476; *Comrs. v. McDaniel*, 52 N. C., 107; *Burke v. Elliott*, 26 N. C., 315; *Gilliam v. Riddick*, *Ib.*, 368; *Day v. Adams*, 63 N. C., 254; *New Bern v. Jones*, 63 N. C., 606, cited and approved).

CIVIL ACTION by one board of directors against another board for the recovery of damages, tried before *Moore, Judge*, July (Special) Term, 1873, of MECKLENBURG Superior Court.

The facts presented by the record, so far as they are pertinent to the points decided on this appeal, are clearly and sufficiently stated in the opinion of the Court.

From the judgment of the Court below, which is fully set out in the opinion, the defendants appealed.

Vance, Guion, J. H. Wilson & Son and *Armfield*, for appellants.

McCorkle & Bailey, Jones & Johnson and *R. H. Barringer, contra.*

RODMAN, J. The facts of this case appearing on the pleadings, so far as we consider them material for the present purpose, may be briefly stated. (349) The action is brought in the name of the railroad company by certain persons claiming to be the president and directors of the company (and whom, for brevity, I shall call, as they were called in the argument, the McDowell directors), to recover damages for certain trespasses alleged to have been committed by the defendants (whom, for the same reason, I will call the Johnston directors), in forcibly entering upon and seizing certain lands and other property of the company under color of proceedings of forcible entry and detainer (Rev. Code, chap. 49), taken before a justice of the peace, who had no jurisdiction to take such proceedings. The plaintiffs also ask an injunction against the defendants to restrain them from further like trespasses and for restitution of the property unlawfully seized. The McDowell directors claim to be the officers of the company under an election held in 1873.

The defendants justified, first, under certain proceedings by a Justice of the Peace under the law in the Revised Code, chap. 49, concerning forcible entry and detainer. Of this plea it will be sufficient to say here that it was bad, because the justice had no jurisdiction. See *Perry v. Tupper* (*post,* 538). Second. That they, the defendants, were duly elected officers of the company in — 1872, and entitled by the charter to hold over until their successors should be duly elected; that the election under color of which the McDowell directors claim was not legally held and conducted, and their pretended election was a nullity; and that the defendants are rightfully the officers of the company, and as such entitled to the possession of the corporate property. This is the plea that we have now to examine.

A corporation in its corporate name can maintain any action respecting its corporate property that an individual can. The persons claiming to be the officers of the corporation, and being *de facto* in possession of the corporate franchises and property, may use the corporate name and seal in (350) the prosecution of such actions. It is settled upon authority that a defendant in such actions cannot defend himself by denying the rightful existence of the corporation if it have a *de facto* existence, or by impeaching the title of the *de facto* officers by showing some irregularity in their election if they have a colorable right. The only way in which the *right* to an office can be tried is by an action of *quo warranto. Navigation Company v. Neal,* 10 N. C., 520, and see note of reporter citing *Turner v. Blaine,* 2 H. Bl., 559; *Elizabeth City Academy v. Lindsay,* 28 N. C., 476; *Comrs. v. McDan-*

iel, 52 N. C., 107. This last case was an action of trespass in which the plaintiff, as a corporation, declared against defendant for rescuing a hog which had been impounded by the town sergeant under a by-law of the town. The defense was that there were no commissioners of Trenton, the election under which the plaintiffs claimed having been irregular and null. The Court say that if the election was irregular, it cannot be treated as a nullity but was color of title, "and the law will not allow their authority (that of the officers) to be impeached in a collateral way," because to do so would tend to produce disorder and collision, and encourage every one to attempt the redress of his supposed wrongs by force.

See also, Angel & Ames Corp., sec. 286, citing *Charitable Association v. Baldwin,* 1 Met., 359; *Green v. Cady,* 9 Wend., 414; and *Rex v. Mayor of Colchester,* 3 T. R., 259. In this last case it was held that when an office was full *de facto,* and another person disputes the validity of the election or appointment, his remedy is by *quo warranto,* and not by *mandamus.* And it would seem that any other action would be even less appropriate.

It is a familiar principle, which seems to cover this case, that the validity of the acts of *de facto* officers cannot be collaterally impeached. *Burke v. Elliott,* 26 N. C., 355; *Gilliam v. Riddick, Id.,* 368.

All these cases differ from the present in this: Here (351) the defendants do not deny the existence of the corporation, but admit it, and claim themselves to be its rightful officers. Every reason, however, for the decision in the cases cited applies with equal force to the present case. And there is a reason against the validity of the plea in the present case, which seems a sufficient one, although not alluded to in those cases, probably because not so clearly applicable as in this.

No precedent can be found for such a plea, and upon the elementary principles of pleading it must be held bad. It does not traverse any fact alleged in the complaint, or confess and avoid the facts alleged, and it does not set up any equitable defense. In effect it is that the persons who have brought the action in the name of the plaintiff have done so without authority from him. This may be true, and yet the plaintiff be entitled to recover.

The plea is no answer to anything in the action, but alleges something foreign to it, and not bearing on the plaintiffs' rights. For it must be remembered, though it seems to have been occasionally forgotten in the argument of counsel, that this is an action *by the corporation* to recover damages, and not by one set of directors against the other.

A corporation, having no corporal existence, can only appear in Court by an attorney of the Court. The Court will permit no person to represent it, without authority, any more than if it were an individual suitor. But such want of authority in bringing or continuing an action cannot be pleaded as a defense, as is here attempted. The Court, on motion bringing the question of authority directly before it, will determine it upon evidence, as was done in the case of *Day v. Adams,* 63 N. C., 254, and also in *New Bern v. Jones, Id.,* 606 where two attorneys each claimed to represent the city, each having in fact a power of attorney from rival boards of officers. The Court decided in favor of the attorney having a power under the corporate seal, thus showing his appointment by the *de facto* officers, and dismissed the action. The Court refused in that way to pass on the rights of the rival claimants. To have done so would have been to deter- (352) mine the rights summarily, without pleadings presenting the issues, and by a proceeding which would not have concluded the parties beyond the particular motion to dismiss.

The two pleas which we have considered being bad, the plaintiff is entitled to prosecute his action notwithstanding them, Our decision on these points, however, may be barren of profitable results to the McDowell directors. Evidently it does not touch the matters which the parties wish to controvert, which are the respective rights of the rival sets of officers. It is open to the defendants to try these rights by *quo warranto;* and if such action be brought and a proper case of probable right be made, there can be no doubt that a Court will enjoin the prosecution of the present action until the rights shall be determined.

As to the injunction against further trespasses by the defendants:

Under the circumstances, and a receiver being in possession, there is no probable cause for continuing it, and it is dissolved.

As to the ownership:

It sufficiently appears from the pleadings that there exists a controversy between rival claimants to the corporate offices, by which the interests of the stockholders are endangered. We think it was a proper case for the appointment of a receiver, and the judgment of the Superior Court in that respect is affirmed.

The case is remanded to be proceeded in in conformity to this opinion, which will be certified to the Superior Court. As the judgment below is modified, neither party will recover costs in this Court.

PER CURIAM. Judgment affirmed.

BYNUM, J., did not sit.

Cited: Bass v. Navigation Co., 111 N. C., 449.

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(353)

N. JENKINS v. H. P. CONLEY and others.

In a suit for damages for an injury to plaintiff's land by ponding water upon it, the defense relied on being an easement by prescription to pond water back by the erection of a new dam in place of an old one, and the plaintiff replying to such defense, that the new dam was higher and tighter than the old one, and that thus the easement was exceeded: *Held*, that the issue submitted to the jury as to the height of the new dam, and as to whether from such height over the height of the old dam the plaintiff was endamaged, are not sufficiently responsive to the allegation and denial in complaint and answer, and that the jury should find whether or not the defendant has exceeded his easement and ponded water back further than he had a right to do by prescription.

CIVIL ACTION, in the nature of a special proceeding, commenced before the Superior Court Clerk of CALDWELL and by him removed to said Court, from whence it was removed upon affidavit to the Superior Court of BURKE where is was tried before *Mitchell, Judge,* Fall Term, 1873.

Plaintiff seeks to recover damages from the defendants for the alleged injury done to his land by ponding water thereon; stating in substance, that the defendant rebuilt a certain dam across Gunpowder creek *"higher and tighter"* than the one originally built, and that thereby water is ponded on his land, which is rendered worthless for agricultural purposes.

Defendants deny the material allegations in the complaint; and on the trial below asked his Honor, as also did the plaintiff, to submit certain instructions to the jury. His Honor instructed the jury as requested by both parties.

Two issues were submitted to the jury, to-wit:

1. Is the new dam higher than the old?
2. Is the plaintiff endamaged by reason of such superior height?

After hearing much conflicting evidence, the jury found both issues in favor of defendant; and his Honor gave judgment against the plaintiff. From this judgment (354) plaintiff appealed.

Folk and *Armfield* and *Collins,* for appellant.
Cilley and *Smith & Strong, contra.*

PEARSON, C. J. The complaint alleges injury to plaintiff's land by the ponding back of water. The answer relies upon an easement to pond back the water acquired by prescription. The replication alleges an excess of the easement, and on this issue is taken, to-wit: Is the damage to plaintiff's land greater now than it was while the old mill-dam was standing; in other words, is the water now ponded back to a point higher than the point to which the defendant had by prescription acquired the right to pond it back?

If, at the erection of the old dam, a mark had been made on a rock above the pond up to which the defendant had an easement to pond the water back in ordinary winter water, and another mark had been made on a rock below the mill fixing the point of "ordinary winter water," as would have been done in case of an express grant of the easement, the issue as to an excess of the easement would have been a subject of direct proof, demonstration; as the easement was acquired by prescription such certainty is not to be expected, and circumstantial evidence must be resorted to on the question of an excess of the easement, for instance, water marks along the banks of a creek at the head of the pond, the fitness of the land for cultivation now as compared with its condition while the old dam was standing, and the deposit of sand in the ditches, etc. So also, the new dam will furnish evidence, for if it be higher or *tighter* than the old dam was, there is an inference that the water is ponded back in excess of the easement.

It is manifest by a perusal of the case that the plaintiff was taken at a disadvantage by the two issues submitted to the jury and by the instruction asked for and given by (355) the Judge.

The issues restrict consideration to the *height* of the dam, which is a matter of evidence, and withdraw consideration from the question in the case, has the easement been exceeded?

1. Is the new dam higher than the old?
2. If it is, has the plaintiff been endamaged by such superior height?

So the question is tied down to the height of the dam, and so restricted, his Honor did not err in giving the instruction. (2. If the new dam is not higher than the old one they must find for the defendant *whether it is tighter or not*), thus making the case turn upon the height of the dam—a mere matter of evidence—instead of its being put upon the fact of an excess over the easement.

In this way the tightness of the dam was withdrawn from the jury, yet it is manifest that that circumstance has a material bearing upon the point on which the case ought to have turned.

Although there is no error apparent from a perusal of the record and the statement of the case made up for this Court, yet from a perusal of all of the proceedings we are satisfied that the ends of justice have not been answered by the action of the Court below, and we remand the case, to the end that a direct issue be submitted to a jury, to-wit, Has the defendant exceeded his easement and ponded the water back farther than he had a right to do by prescription?

The plaintiff will pay the costs, including the cost in the Court below.

PER CURIAM. Case remanded.

Cited: Grant v. Bell, 87 N. C., 42.

STATE v. JARRATT WHITFIELD.

The prosecutor, a white man, the employer of the defendant, a colored man, goes to the field where the defendant is at work, with two other white men, and tells him that he has lost a hog, at the same time saying "I believe you are guilty; if you are, you had better say so; if you are not, you had better say that," and the defendant confesses his guilt: *Held,* that the confession was made under the influence of hope or fear, or both, and under the circumstances was inadmissible.

(*State v. Davis,* 63 N. C., 578, cited and commented on).

INDICTMENT for larceny, tried at Fall Term, 1873, of MARTIN Superior Court, before *Moore, Judge.*

On the trial below the defendant was convicted. Judgment and appeal.

The facts of the case and the questions raised upon the trial are fully stated in the opinion of the Court.

No counsel for defendant in this Court.

Attorney-General Hargrove, for the State, cited and relied on the decision of the case of *State v. Noah Davis,* 63 N. C., 578.

PEARSON, C. J. We do not concur in the legal inference that, upon the facts found, the confession of the defendant was voluntary and therefore admissible as evidence.

The facts found are as follows:

The owner, a white man, had lost a hog the night before, and on the following morning, suspecting the defendant, went into his field in company with two other white men, where the defendant, a colored man in his employment, was at work, and, telling him that the hog had been stolen, said to him: "I believe you are guilty; if you are, you had better say so; if you are not, you had better say that." Whereupon the defendant confessed the larceny. His Honor held, as a matter of legal inference, these facts do not show that the prisoner was under the influence of either hope or fear, and, deeming the confession voluntary, admitted it as evidence.

We have this case: The master, a white man, goes with two other white men into the field where his hireling, a negro, is at work. The master says: "I believe you are guilty; if you are, you had better say so." Here is fear excited by a direct charge made by the master, who had brought with him two other white men, and hope suggested by the assurance, "If you are guilty, you had better say so." The defendant is subdued and puts himself upon the mercy of the white men. True, the master adds, "If you are not, you had better say that"; but this must be qualified by the fact that the master had just said "I believe you are guilty," and the inference is, "If you say that I will not believe you."

It is contrary to the genius of our free institutions that any admissions of a party should be heard as evidence against him unless made voluntarily. The common law looks with jealousy upon anything that has the semblance of torture, and declares that no confession of guilt shall be heard in evidence unless made voluntarily; for, if made under the influence of either hope or fear, there is no test of its truthfulness. Nor can we lose sight of the fact that the moral effect of the supremacy of the white man has not passed away. When an ignorant negro is charged by his employer, supported by two other white men, with having stolen a hog, and told "If you are guilty, you had better say so," there is no guarantee of the truth of his admissions; probably they are true, but it may be that he gave way to fear, and, under the illusion of the hope held out to him that it would be "better for him to confess," made a confession contrary to the fact. Such is the abhorrence of the common law in respect to extorting confessions that it is a settled rule no confession of one charged with crime shall be admitted in evidence against him when it appears that the confession was made by reason of hope or fear. From the facts set out, we are satisfied, as a matter of legal inference, that the prisoner made the confession under the influence of hope (358) or fear, or both feelings, excited by the conduct and language of the parties who had him in their power.

In the case of *State v. Nero Davis,* 63 N. C., 554, the facts and the legal inference are set out in such a confused manner that the Court felt under great embarrassment, and, after much hesitation, concurred in the ruling of his Honor in the Court below.

PER CURIAM. Judgment reversed and *venire de novo.*

Cited: State v. Drake, 82 N. C., 594; *State v. Sanders,* 84 N. C., 730; *State v. Ellis,* 97 N. C., 449; *State v. Davis,* 125 N. C., 614.

D. B. ROBINSON v. WILLIS J. WILLOUGHBY and D. R. CHRISTENBURY.

Since the statute of 1829, deeds in trust and mortgages are of no validity whatever as against purchasers for value and creditors until they are registered, and they take effect only from and after the registration. No notice, however full and formal, will supply the place of registration.

(The cases of *Flemming v. Burgin,* 37 N. C., 584; *Leggett v. Bullock,* 44 N. C., 283, cited and approved).

CIVIL ACTION to foreclose an equity of redemption, for an account and other relief, tried at Fall Term, 1873, of UNION Superior Court, before *Buxton, Judge.*

The case, as transmitted to this Court, states that after the amendment of the pleadings heretofore allowed and approved by this Court in the same case, 67 N. C. Rep., 84, changing the original suit from an action for the recovery of real property into an action to foreclose, etc., and D. R. Christenbury, the original owner of the land (under whom both Robinson and Willoughby make claim by different conveyances) having been made a party defendant, although he filed no answer, the cause came on to be tried upon the following issues.

1. Did the defendant Willoughby, before taking his deed from Christenbury, have notice that Christenbury had previously conveyed the land in controversy to the plaintiff?

2. Did the defendant purchase the land *bona fide* for a valuable consideration?

3. Did the plaintiff assent to the sale of the land by Christenbury to the defendant Willoughby?

The deed from Christenbury to the plaintiff, was in form an absolute fee-simple deed of bargain and sale, reciting a consideration of three hundred and ten dollars; it was dated 25 December, 1865, proved 8 January, 1869, and registered 8 February, 1869, for fifty-two acres of land. Contemporaneously with the execution of this deed Christenbury also executed a note of hand, payable to the plaintiff in the sum of $310 in specie or its equivalent, on or before 25 December, 1867, with interest from date—this note being given in renewal and consolidation of previous indebtedness from Christenbury to the plaintiff; and at the same time the plaintiff executed and delivered to Christenbury a penal bond in the sum of $620, conditioned to make Christenbury a title to the land upon payment of the sum of $310, with interest, secured by said note. The papers were all drawn by one Stillwell, who managed the transaction for the parties. The bond for title is still in the possession of Christenbury and has never been registered; and the note for $310 is still in the possession of Robinson and no part thereof has been paid. It evidences the consideration of the deed.

The deed from Christenbury to the defendant, Willoughby, was a deed of similar character, for the same land, reciting a consideration of five hundred dollars; it was dated 17 January, 1867, proved 24 April, 1867, and registered 3 June, 1867. The defendant, Willoughby, is in possession of the property—Christenbury having surrendered it to him upon receiving in exchange another tract of land, estimated at $500, in South Carolina.

For the plaintiff, upon the first issue submitted in regard to notice, one Sam Yandle testified:

(360) That in 1866 he rented the land, the subject of the present controversy, from Christenbury, who offered to sell it to him; that he declined to purchase, having ascertained, as he thought, that the right to the land was held by the plaintiff, Robinson. In the fall of 1866, he, the witness, met Willoughby, the defendant, on the court-house steps in Monroe and asked him "if he had finished his land trade with Christenbury?" Willoughby replied "that he had not;" whereupon he asked him "if he knew he was buying a lawsuit if he bought that land?" To which Willoughby answered that "he did not know that." Witness then told him that he had understood that the land belonged to Robinson.

Willoughby said that he would inquire into it, and if it was as the witness understood, that "he would call off the dogs and have nothing more to do with it."

Upon his cross-examination this witness testified: That this conversation with Willoughby was at the Fall Court, 1866; that he was standing on the steps of the court-house, with his brother, Enoch Yandle, when Willoughby walked up. Witness had heard that he, W., was on a trade for the land sometime that summer; thinks it was Christenbury gave him the information, but is not certain. The land is some twelve or thirteen miles from the present residence of Willoughby. The year witness rented the land Christenbury had no settled home but was engaged in mining, he thinks, and was "flying about." Witness did not say, in his direct examination, to Willoughby, "You have bought a lawsuit," but asked if he (Willoughby) knew he was buying a lawsuit? Witness was acquainted with Willoughby before this, and had spoken to him before this conversation occurred; witness informed Willoughby of this because he, "Christenbury was such a rascal," and he did not want him, W., to be taken in. Witness did not remember any conversation with Willoughby in the fall of 1867, may have had one nevertheless; can't say when Willoughby took possession of the place.

Direct examination resumed, when the witness further testified: "That Christenbury offered to sell him (361) the land while he had possession of it as tenant; that he inquired into the title and was informed by Stillwell, who had drawn the writing, that the title was in Robinson, the plaintiff.

Enoch Yandle, a witness for plaintiff, called and corroborated the statements of the foregoing witness.

Willoughby, one of the defendants, was examined for the defense and denied having any notice or information of the claim of the plaintiff until after he had obtained his own conveyance from Christenbury. In relation to the conversation with Yandle, he testified that the Yandles were mistaken, both as to the time it occurred and to the purport of what was said.

The defendant's counsel, the evidence being closed, insisted, that the mortgage of the plaintiff was void as against the defendant, a subsequent purchaser, for want of registration, and that too, irrespective of the question of notice, there being no saving of that sort in the statute cited and relied upon. Rev. Code, chap. 37, sec. 22 (Act of 1829). His Honor ruled that under the adjudication of our Courts *notice* would supply the place of *registration* as against a subsequent purchaser.

Defendant excepted.

As to notice, the defendant's counsel asked his Honor to charge the jury that the notice required to supply the place of registration in a case like the present was "such notice of the contents of the instrument, as to the subject and purpose of the conveyance and of the intention to rely on it as a conveyance, substantially reaching the party *in pais* as would be derived upon those points from the registry itself," and that, taking the evidence of the Yandles to be true, it was not sufficient to prove the required notice.

His Honor declined so to charge, and instructed the jury that a more recent definition of the notice required in a case like the present was "such information as would put a man of ordinary prudence on his guard and cause him to inquire;" and that it was for them to determine, from the evidence, whether Willoughby, before taking his deed from
(362) Christenbury, had notice that Christenbury had previously conveyed the land in controversy to the plaintiff.

Defendant again excepted.

The jury having found the second issue in favor of the defendant his counsel thereupon moved for judgment in his favor, dismissing the suit, and for costs, notwithstanding the jury had found the first and third issues in favor of the plaintiff; motion refused by the Court and defendant again excepted.

Motion for a new trial for alleged errors in the charge of his Honor, and for refusing judgment, etc. Motion overruled. Judgment in favor of plaintiff; appeal by defendant.

Battle & Son, for appellants.
J. H. Wilson, for plaintiff.

(363) READE, J. Prior to 1829 it was settled by the authority of elementary writers, and by the decisions of

our own courts, that an unregistered incumbrance would be upheld by the courts of equity against a subsequent registered incumbrance or conveyance with notice of the former, and that creditors and purchasers for value were affected by notice of prior equities, and that such notice might be proved by parol. And such is the law now except in regard to deeds in trust and mortgages which, though good between the parties, are void both in law and equity against creditors and purchasers for value unless and until they are registered and then only from and after such registration.

In 1819 an act was passed declaring that "no deed in trust or mortgage * * * shall be valid at law to pass any property as against creditors and purchasers for a valuable consideration * * * but from the registration," etc. Rev. Code, chap. 37, sec. 22. Since that statute the decisions have been uniform that deeds in trust and mortgages are of no validity whatever as against purchasers for value (364) and creditors unless they are registered; and that they take effect only from and after registration, just as if they had been executed then and there. *Fleming v. Burgen,* 37 N. C., 584; *Leggett v. Bullock,* 44. N. C., 283.

It is not necessary that we should consider the other points made as to the sufficiency of the notice; because no notice, however full or formal, will supply the want of registration.

But note this is only in regard to deeds in trust and mortgages. In regard to other prior equities and notice the doctrine remains as before 1829. And note also, that there is no allegation that the plaintiff was prevented from having his deed registered by the *fraud* of the defendant.

There is error. *Venire de novo.*

Per Curiam. Judgment reversed.

Cited: Blevins v. Barker 75 N. C., 438; *Todd v. Outlaw,* 79 N. C., 237; *Brem v. Lockhart,* 93 N. C., 195; *Ijames v. Gaither, Id.,* 361; *Weaver v. Chunn,* 99 N. C., 434; *Hinton v. Leigh,* 102 N. C., 32; *Duke v. Markham,* 105 N. C., 138; *Long v. Crews,* 113 N. C., 257; *Quinnerly v. Quinnerly,* 114 N. C., 147; *Hooker v. Nichols,* 116 N. C., 160; *Bostic v. Young, Id.,* 771; *Barrett v. Barrett,* 120 N. C., 130; *Blalock v. Strain,* 122 N. C., 285; *Collins v. Davis,* 133 N. C., 109; *Bell v. Couch, Id.,* 350.

DOE ex dem. MARGARET McLENNAN and others v. ALEXANDER McLEOD.

1. In the old action of ejectment the fiction of a "lease, entry and ouster" was adopted merely for the sake of saving the trouble and expense of making a lease and entry; therefore no lease can be set out in the declaration which could not have been made at the time the action was commenced.

2. An action of ejectment does not abate by the death of the lessor of the plaintiff, and there is no necessity to make the heirs of the lessor parties to the suit, except to make such heirs liable for costs, the supposed lease being in no way affected by the lessor's death.

(*Adderton v. Melchor,* 31 N. C., 349, cited and approved; *Skipper v. Lennon,* 44 N. C., 189, commented on).

(365) CIVIL ACTION, ejectment under the old practice, tried before *Buxton, Judge,* Fall Term, 1873, of the Superior Court of MONTGOMERY.

The action was commenced by serving a copy of the declaration on the defendant, 20 June, 1867.

Originally there was but one count, a single demise in the name of the present plaintiff, Margaret McLennan, the date of such demise being 1 January, 1866. After a decision of *Margaret McLennan v. R. C. Chisholm,* at January Term, 1872, of this Court, 66 N. C., 100, the plaintiff asked and obtained leave to add another count to the declaration, containing a joint demise, in the name of C. H. Rush and wife and T. C. Halton and wife, heirs at law of the testator, Roderick McLennan. Margaret McLennan was his widow and devisee.

On the trial it was discovered that Roderick McLennan, who claimed the land in controversy under a deed from one Farquhar Martin, had, through the omission of the word "heirs" in the deed, obtained only a life estate. The plaintiff thereupon suffered a *nonsuit,* which, however, was set aside upon the payment of all costs, and leave granted to amend the declaration by adding another count, containing a demise in the name of M. S. Martin, son and heir at law of Farquhar Martin, then dead. The proposed amendment was not made at the time and the case was continued.

When the case was called at the succeeding term, the defendant insisted that before going to the jury the plaintiff, if he intended to take the benefit of the amendment, which he had obtained leave to make at the last term, should do so at once by actually inserting in the declaration the count containing the demise in the name of M. S. Martin, so that it might distinctly and definitely appear upon the face of the declaration what the Court and jury were to try.

On attempting to comply with this requirement, which the Court deemed reasonable, the plaintiff was met with the difficulty, viz.: The suit was commenced in 1867, at which time Farquhar Martin was alive, he having died in November, 1871; so that, at the commencement of the suit, M. S. Martin, his son and heir at law, had no interest in the (366) land, and it would not do to lay a demise in the name of M. S. Martin. To obviate this difficulty the following proceedings were adopted on behalf of the plaintiff, with the approval of the Court, notwithstanding objections made on the part of the defendant.

1. On motion of plaintiff, a count was added to the declaration containing a demise in the name of Farquhar Martin.

2. The death of Farquhar was suggested on the record by the plaintiff.

3. On motion of plaintiff, M. .S. Martin, son and heir at law of Farquhar Martin, obtained leave of Court and came in and made himself party of record to prosecute the suit in place of his father.

The defendant objected on two grounds:

1. Because Farquhar Martin is now dead, and it is inadmissible to make a dead man a party to a suit.

2. Because the suit had abated so far as Farquhar Martin was concerned, by the length of time which had elapsed since his death.

His Honor being of opinion that these proceedings were not incongruous or inconsistent with the fiction of the action, inasmuch as the declaration, as amended, spoke as of the appearance term, also being of opinion that the action of ejectment did not abate by the death of a lessor, John Doe being the plaintiff of record, and being of opinion that the amendment was consonant with justice and calculated to bring the case to trial upon its merits, overruled the objections of the defendant, but offered to grant a continuance if the defendant was taken by surprise, or at a disadvantage, by the amendments and proceedings referred to.

The defendant excepted to the ruling of the Court and appealed to the Supreme Court.

Battle & Son, with whom was *McDonald,* for appellant.
Pemberton, with whom was *Neill McKay, contra.*

(367) PEARSON, C. J. The interest which used to attach to "the fictions" in the action of ejectment has passed away since the adoption of the Code of Civil Procedure.

The fiction of a "lease entry and ouster" was adopted merely for the sake of saving the trouble and expense of making a lease and entry. It follows, as a logical conclusion, no lease can be set out in the declaration which could not have been made at the time the action was commenced. *Adderton v. Melchor,* 29 N. C., 249.

Tested by this principle, the exception of the defendant cannot be sustained. Farquhar Martin was living at the time the action was commenced; so he could *at that time* have made a lease, and his lessee could have entered. The objection to the amendment on the ground "that Farquhar Martin is now dead—and it is inadmissible to make a dead man a party to a suit—was based upon a misapprehension of the principle. The amendment did not make Farquhar Martin a party to the action, but merely *supposed* that he had made a lease at the time the action was commenced. He was (368) then living and could have made the lease, and the fiction is merely to save the trouble and expense of actually making the lease.

The second objection is also untenable. The action did not abate by the death of the lessor, and there was no necessity for making his heirs parties except to make them liable for the costs, for the lease supposed was in no way affected by his death.

In *Skipper v. Lennon,* 44 N. C., 189, the rule was misapprehended, and the Court, professing to act on the principle settled by *Adderton v. Melchor, supra,* manifestly fell into error by supposing *the time* to refer to the application for the amendment instead of the date of the commencement of the action.

There is no error. This will be certified, to the end that the case may be proceeded in with the amendment.

PER CURIAM. Judgment affirmed.

Cited: McLennan v. McLeod, 75 N. C., 65; *Parker v. Banks,* 79 N. C., 483.

SAMUEL W. LATHAM v. JUDSON B. BLAKELY.

1. Where the owner of the inheritance attaches to the freehold articles of personalty for the better enjoyment of the estate, such articles become a part of the realty and pass to the heir, mortgagee or vendee.
2. And while an owner may detach fixtures and convert them into personalty, yet he cannot do so after an execution has been levied on the land to which they are attached.

(*Lawrence v. Bryan,* 50 N. C., 331, cited and approved).

CIVIL ACTION (to recover the value of a cotton gin), tried at Fall Term, 1873, Superior Court of BEAUFORT, before *Moore, Judge.*

On the trial below the following facts were established:

In the spring of 1869 the sheriff of Pitt County, under an execution in favor of D. M. Carter, sold the (369) lands of the plaintiff in this action, Sam. W. Latham, situated in said county, at public sale, D. M. Carter becoming the purchaser and receiving from said sheriff the usual conveyance. On this land so sold by the sheriff was a gin-house in which was a cotton gin with the usual gearing, which gin, a few days before the sale, the plaintiff (who did not reside on the farm) sold and with one Henry Putnam removed from the gin-house to another house on the premises. On the day of sale he, the present plaintiff, informed Carter, the plaintiff in the execution, of such removal, who assented thereto, but informed no other person. After the purchase Carter rented the land to the plaintiff, Latham, for one year.

In the Fall of that year Latham replaced the gin in the house from which he removed it and ginned his cotton with it. The gin was not fastened to the house in any manner, but a piece of plank was nailed to the floor and the front ledge of the gin rested against this plank to prevent it from moving when the band was applied and the gin at work; such is the usual way of securing a gin in its place. After ginning his cotton the plaintiff, Latham, removed the band and carried it home, but whether before or after the sale to the defendant, hereinafter spoken of, does not appear.

It was also in evidence that Carter requested Putnam to show the premises to any one desiring to purchase; and that he showed them to one L. M. Blakely, as agent for the present defendant Witness showed the gin-house and gin to him, moving the machinery of the same by hand for him to see how easy and well it worked; this was a few days prior to the purchase of the land by the defendant, Blakely, and before Latham had finished ginning his crop. Witness knew that Latham claimed the gin and so informed Carter, suggesting at the same time that possibly this claim might defeat the contemplated trade. To this Carter replied that he "was not going to lose an $8,000 trade for an old gin." Blakely was not informed that Latham claimed the gin; the latter never met him on the farm. (370) He, the plaintiff, demanded the gin of the defendant before this suit was instituted, which demand was refused.

In January, 1870, Carter and wife conveyed the premises to the defendant, and at the same time the plaintiff and his wife conveyed their interest to Carter.

On the part of the plaintiff it was contended that the gin was a chattel, and did not pass by any conveyance to the defendant, as he, the plaintiff was a tenant under Carter and used the gin as a tenant.

For the defendant it was contended that the gin was a fixture and passed with the freehold.

His Honor instructed the jury that the plaintiff was entitled to recover.

Verdict for the plaintiff. Motion for a new trial; motion refused. Judgment, and appeal by defendant.

Battle & Son, for appellant.
Warren and *Carter, contra.*

SETTLE, J. Where the owner of the inheritance, in making improvements, attaches to the freehold articles of personalty for the better enjoyment of the estate they become part of the realty and pass to the heir, mortgagee or vendee, as against the executor, mortgagor or vendor. *Elwes v. Mawe,* 2 Smith L. Cases and notes; *Walmsby v. Milne,* 27 E. C. L., 114. And while the owner may undoubtedly detach fixtures and convert them again into personalty, yet he cannot do so after an execution has been levied upon the land to which they are attached Here it is contended that the gin had been severed and re-converted into personalty by the plaintiff (after, however, an execution had been levied upon the land), and that Carter, the purchaser at the sheriff's sale, had assented thereto, and that when the plaintiff, as lessee under Carter, replaced the gin in the house it became a trade or agricultural fixture which he might remove. However that might be as between the plaintiff and Carter, the rights of (371) of a third party, the defendant in this action, have intervened, who purchased, when the gin was in its proper place and in good working order, without notice of any claim on the part of the plaintiff. But the defendant cannot even claim the benefit of the exception to the general rule in favor of trade fixtures as between landlord and tenant, for he failed to remove the gin before the expiration of his term. But in our review of the case that question is not represented.

When the agent of Carter showed the gin to the agent of the defendant, before the contract of sale was made, he evidently conveyed the idea that the gin was a part of the realty and it was not deemed advisable to spoil a good trade "for an old gin."

And it will be observed that, in addition to the sheriff's deed, the plaintiff and wife, for the purpose of removing all clouds from the title, on the first day of January, 1870, also conveyed to Carter the said premises without any reservation whatever, and that on the same day the said Carter conveyed to the defendant, without reservation of the gin, or any notice that it was claimed by the plaintiff.

What the plaintiff did or said to Carter cannot affect the rights of the defendant under these conveyances.

In answer to the suggestion that the gin was not sufficiently attached to the house to make it a part thereof, we observe that the later and better authorities pay more regard to the purposes which are to be served by the thing attached than to the manner of making the actual attachment.

In South Carolina it is held that a cotton gin in its place, *i. e.,* connected with the running works in the gin-house, is a fixture which passes to the purchaser of the house. *Bratton v. Clawson,* 2 Strobhart, 478. And this Court has held that planks laid down as an upper floor of a gin-house, and used to spread cotton seed upon, though not nailed or otherwise fastened down than by their own weight, become a part of the gin-house by being put in it for the purpose of being used with it, and the Court says, "in that view it makes (372) no difference whether they were nailed to the sleepers or not." *Lawrence v. Bryan,* 50 N. C., 337.

Let it be certified that there is error.

PER CURIAM. *Venire de novo.*

Cited: Bond v. Coke, 71 N. C., 98; *R. R. v. Comrs.,* 84 N. C., 507; *Foote v. Gooch,* 96 N. C., 270; *Horne v. Smith,* 105 N. C., 325; *Overman v. Sasser,* 107 N. C., 436.

A. J. and M. C. KING v. DRURY WEEKS and WM. H. THOMAS.

1. A purchase by a man in his own name with funds in his hands of a fiduciary nature creates a resulting trust in favor of those whose money is employed in the purchase.
2. *Therefore,* where land has been purchased with partnership funds, although it be conveyed to one partner only, yet it becomes partnership property.

CIVIL ACTION (for the recovery of certain lots in the town of Murphy), tried before *Cloud, Judge,* Fall Term, 1873, of Superior Court of CHEROKEE.

The case as settled and sent up with the record to this Court states:

That Drury Weeks, the defendant, as trustee of one Brabson, sold two lots in the town of Murphy which Brabson had conveyed to him to secure a debt due to the firm of Thomas & King, and that J. W. King, the father of the plaintiffs in this action, and a member of the firm of Thomas & King, bought the same and took the deed therefor to himself individually. King paid no money or other consideration to Weeks, the trustee, but allowed his bid to be credited on Brabson's account, which was secured in the trust, the bid being less than the account. King died in 1845, leaving the plaintiffs, his heirs at law, and without having had any settlement of the partnership affairs of his co-partner, Thomas.

As the case in this Court turned upon the instructions given below, and which are fully set out in the (373) opinion of *Justice Settle,* the statement of the evidence offered in regard to the settlement of the partnership affairs by the administrator of J. H. Kink, not being relevant, is omitted.

Defendant excepted to the charge of his Honor, and upon the return of a verdict in favor of the plaintiff moved for a new trial. Motion refused. Judgment and appeal by defendant.

T. D. Johnston, with whom were *McCorkle & Bailey* and *Gudger,* for appellants.

A. T. F. Davidson, and *Folk, contra.*

SETTLE, J. This was an action to recover the pos- (376) session of two lots in the town of Murphy, Cherokee County. It appears that one Brabson had executed a deed conveying these lots to the defendant, Weeks, in trust, to secure the payment of certain debts due to the firm of Thomas & King; which firm was composed of J. H. King, the plaintiff's ancestor, and W. H. Thomas, the other defendant.

J. W. King died in 1845, intestate, leaving the plaintiffs his heirs at law. It further appears that in 1841, Weeks, the trustee, sold the lots in pursuance of the deed in trust, and J. W. King, one of the partners, bid them off and took the title in his own name from the trustee; he did not pay any money or other consideration for the same, but allowed the bid to be credited as part payment on the debts due the firm which were secured by the deed; the amount bid was less than the amount so secured. The partnership affairs of Thomas & King had never been settled in the life-time of King. His Honor charged the jury that where a partner in a firm purchased real estate with the partnership effects, and took the deed to himself, the presumption of law is that the partner so purchasing credits his co-partner with his part of the amount bid or paid for the property, and charges himself with it, and is entitled to the property in his own individual right.

This charge cannot be sustained. On the contrary, the rule is, where land has been purchased with partnership funds, although it be conveyed to one partner only, yet it becomes partnership property.

"A purchase by a man in his own name, with funds in his hands in a fiduciary capacity, creates a resulting trust in favor of those whose money is thus employed; as in case of a trustee, a partner, an agent for purchase, an executor, (377) a guardian, the committee of a lunatic, and the like." Adams Eq., and notes and references to American decisions, p. 33.

There must be a *venire de novo.*

PER CURIAM. *Venire de novo.*

Cited: Lyon v. Akin, 78 N. C., 260; *Bank v. Simonton,* 86 N. C., 189; *Bond v. Moore,* 90 N. C., 245; *Norton v. McDevit,* 122 N. C., 758.

STATE on the relation of PENELOPE MABRY and others v. JOSEPH A. ENGELHARD and others.

In August, 1862, Confederate notes constituted the currency of the country; and a Clerk and Master, acting under an order of the Court to collect, is protected in receiving such money in payment of notes given for the purchase of land; and, although he had no authority to invest the money and would have been liable for any loss arising from such investment, still, having invested the same in good faith in Confederate bonds equally as good as the currency itself, he cannot be held responsible for their loss occurring by the results of the war.

CIVIL ACTION upon the official bond of the defendants submitted to and decided by *Moore, Judge,* at Spring Term, 1873, of the Superior Court of EDGECOMBE, upon the following case agreed:

The defendant had been appointed Clerk and Master in Equity in Edgecombe County in 1860, and at Spring Term, 1861, executed his bond as such in the penal sum of $15,000, with the other defendants as his sureties. When the defendant, Engelhard, entered on the duties of his office there were delivered to him as Clerk and Master certain bonds executed by B. W. Mabry, B. Mabry, and others, for the purchase-money of certain lands, which had been sold as the property of the heirs of Charles Mabry, deceased, by a decree of the Court of which said Engelhard was Clerk and Master, and purchased by B. W. and B. Mabry. The decree in the proceedings for said sale are herewith filed, marked "A," "B," etc. (378)

In 1862 the defendant, Engelhard, was in Virginia, and left the papers of his office in the possession of Matthew Weddell, a merchant of Tarboro, a man of reliable business qualifications, to act as his agent. B. Mabry called on Weddell and proposed to pay a part of the aforesaid bonds. Weddell told him he did not know what to do with the money, and could not take it until he could hear from Engelhard. He then wrote to Engelhard, perhaps twice before receiving an answer; at last he did receive instructions from him to receive the money and invest it in confederate bonds. On 7 August, 1862, he, Weddell, received $4,000 of the money in confederate currency, credited the amount on one of the notes, and invested in confederate bonds, at the same time investing some of his own money in like manner. Defendant instructed Weddell to invest in confederate bonds, as that would be convenient for re-conversion to currency, if needed.

On 21 October, 1862, Englehard resigned his office to Judge Heath, in vacation, and on the same day John Norfleet was appointed Clerk and Master, who gave the required bonds and qualified as such, when, by agreement between Norfleet and Weddell, the papers belonging to the Clerk and Master's office, other than the confederate bonds aforesaid, continued to be kept in Weddell's safe. Norfleet had been informed by Weddell that the $4,000 had been received and invested in confederate securities, and that the same were in Petersburg, Va., in the hands of Mr. James Weddell for safe-keeping, and that he, Norflect, could get them whenever he desired to do so. The bonds remained in Petersburg until the close of the war, no one during the time applying for them. Neither Weddell or Engelhard gave any notice to the person entitled to the money of the purpose to invest the same in confederate bonds.

The parties entitled to the money are the relators, Penelope Mabry, the widow of Charles Mabry; B. Mabry and B. W. Mabry (the purchasers of the land); Virginia Mabry, Susan F. Pippin, Louisa Savage, Francis E. C——, Mary A. C——, and Delia F. Gorham, the intestate of the re- (379) lator John C. Gorham, and Charles D. Mabry the the testator of the relator Blount Bryan, who were the heirs of Charles Mabry.

Previous to the resignation of Engelhard and the appointment of Norfleet, sometime in October, 1862, Penelope Mabry, one of the relators, applied to Norfleet to get her share of the money, and was told by him that he had been informed that the money had been invested in confederate bonds and left with Weddell. Norfleet also told her that as the money had been so invested, perhaps it would be better for those interested in the fund; for if the confederacy was successful she would get eight per cent. on the money, a good interest. To this she replied that she wanted her money.

No application was ever made to Engelhard or Weddell for the money by any of the parties entitled, or to Norfleet, except as before stated. No notice was ever given by Norfleet to either Engelhard or Weddell of the application, or that the money was wanted or needed; and no motion was ever made in Court about or exception taken to the investment until after the close of the war, except the decree rescinding or modifying the order of collection made on motion of counsel.

(The case agreed here sets out the ages, residences, etc., of the several relators, and the amounts to which each are entitled. These facts not bearing upon the point decided in this Court are not inserted).

If the Court should be of opinion that the relators are entitled to recover the full amount of the fund invested, the judgment shall be rendered in their favor for $4,060.68.

If the Court should be of opinion that the relators are entitled to recover, but that the scale of damages is the difference in value between the money invested and the value of the same at the time the defendant, Engelhard, went out of office, then it is agreed that the Court may assess the damages and give judgment accordingly; otherwise, there shall be a judgment of nonsuit.

The Court being of opinion with the defendants gave judgment dismissing the action, and against the relators for costs; from which they appealed to this Court.

Moore & Gatlin, counsel for appellants. (381)
Smith & Strong, contra.

PEARSON, C. J. We concur with his Honor in the opinion that the facts set out in the case agreed do not warrant the legal inference of a want of due diligence on the part of the defendant, Engelhard, as to collecting in Confederate notes in 1862. The bonds in the hands of Engelhard as Clerk and Master were due and the obligors had a right to make the payment, and when they insisted upon this right the duty of refusing to accept Confederate notes and taking upon himself the odium of doing so, was not imposed by law upon the defendant. In August, 1862, Confederate notes constituted the currency of the country, and were but slightly depreciated, and the order of collection was in force. So there was no ground upon which the defendant could have refused to accept payment when the obligors insisted on their right to pay off the bonds.

As to investing in Confederate bonds: The Clerk and Master was not authorized to invest the fund collected by him. His duty was to hold it and make return to the next term of the Court, or pay it to such of the parties as applied for their shares. So if any loss had resulted from this unauthorized conversion of the fund he would have been liable, but the fact is, the Confederate bonds were just as good as the Confederate notes, and the fund was benefited by the interest on the bonds. Had the defendant used the Confederate notes or mixed them with his own money and afterwards bought up Confederate bonds to supply the place of the converted fund, it would have materially altered the case, and might have led to the inference of want of *bona fides,* but (382) such an inference is rebutted by the fact that his agent who received the Confederate notes was directed to invest in

Confederate bonds, which was done at the time the notes were received.

No error.

PER CURIAM. Judgment affirmed.

Cited: Patton v. Farmer, 87 N. C., 341.

JAMES C. WARREN v. STEPHEN E. WOODARD.

The lien of a laborer who commenced work in January, 1873, attaching by virtue of the provisions of the Act of 1868-'69, chap. 206, sec. 9, is not divested in favor of the lien created by the Act of 1872-'73, chap. 133, sec. 1, ratified 1 March, 1873, as that would be impairing a vested right, as well as the obligation of a contract.

CONTROVERSY, submitted without action, to *Albertson, Judge,* Fall Term, 1873, Superior Court of CHOWAN.

The facts agreed are:

The plaintiff, Warren, rented his farm for the year 1873 to one Small for $1,500. On 1 March of that year Small executed to plaintiff a trust deed on account of money and supplies contracted to be advanced for $. . . ., conveying in said deed his crops to be raised on said farm during the year. On 4 July, 1873, Small executed to Warren another trust deed to secure payment of rent and further advances, and in that deed conveyed his crops on said farm.

The plaintiff has already received more than sufficient to pay the rent, but not enough to discharge both trusts, and claims the balance of the crops on land which were raised on said farm, under the said deeds.

Small, the lessee, on 1 January, 1873, contracted with the defendant, Woodard, for his services in making the crop, agreeing to pay him $275. Woodard commenced (383) work 11 January, and continued during the entire year. He filed his lien in the Superior Court Clerk's office, but subsequent to the registration of the trust hereinbefore mentioned. Plaintiff knew all the time that the defendant was laboring on the farm..

Defendant claims the balance of the crop after paying rent to be subject to his lien. Plaintiff claims that all the debts due from Small to him, and secured by the trusts, shall be paid in preference to the demand of the defendant.

The crop on hand is more than sufficient to pay the defendant but not enough to pay him and plaintiff.

His Honor, being of opinion that the defendant's lien was prior to the plaintiff's, gave judgment in his favor; from this the plaintiff appealed.

No counsel in this Court for appellant.
A. M. Moore, contra.

RODMAN, J. We are of opinion that upon the case agreed the defendant is entitled to judgment. Woodard commenced his work on the farm of the lessee, Small, in January, 1873, and duly filed a notice of his claim within thirty days after the termination of work under his contract, as required by the Act of 1869-'70, chap. 206, sec. 9. The liens of the plaintiff which are in controversy are founded upon assignments to him to secure advances of money and supplies to the lessee made subsequently, viz., March and July, 1853.

Section 2 of the act cited says: "The lien for work on crops or farms, or materials, given by this chapter, *shall be preferred to every other lien or encumbrance which attached upon the property subsequent to the time at which the work was commenced, or the materials were furnished.*"

This section covers the question between the parties, and we consider that it is not qualified so as to affect the present case by any provisions of that or subsequent acts. Section 6 of that act seems to relate only to conflicting (384) claims between laborers or material men, and so does section 12, and they do not apply in this case.

The Act of 1866-'67, chap. 1, sec. 1, says that persons making advances of money or supplies to persons engaged in the cultivation of the soil shall be entitled to a lien on the crops made during the year, *"in preference to all other liens existing or otherwise to the extent of such advance or advances,"* provided the agreement be in writing and registered within thirty days after its date.

This act was qualified by the later Act of 1869-'70, above cited. The Act of 1866-'67, was, however, re-enacted by the

Act of 1872-'73, chap. 133, sec. 1, ratified 1 March, 1873. Thus re-enacted it is apparently in direct conflict with the Act of 1869-'70, which gives a priority to laborers and ordinarily would be held to repeal it. We need not consider now what would be the operation of the re-enacted act upon the lien of a laborer who began to work after the act went into effect. In this case the work was begun by the defendant before the passage of the re-enacting act, and while the Act of 1869-'70 was the undisputed law. By this act the defendant had an inchoate lien which was capable of being made perfect, and to relate back to January, 1873, and which was in fact perfected as required by the act by filing a notice with the proper officer. It has not been contended that the Legislature could not give a lien by relation back to a time which may happen to be long before the filing of notice. Such a law may impose upon every one who advances money or supplies to a planter the burden of ascertaining by personal examination on the farm what laborers have worked on it thirty days before, and when they began work, and the amounts due to them, and also the value of any materials supplied within thirty days before, and whether they have been paid for. But if it impairs no vested rights, the question of its expediency is solely with the Legislature. In the present case, if the effect of the Act of 1 March, 1873, were to destroy the inchoate lien of the (385) defendant, which began by relation in January, 1873, and give a priority to the subsequent liens of the plaintiff, it would be unconstitutional, as impairing a vested right, and also as impairing the obligation of a contract; for under the law in force when the defendant's contract with Small was made the contract was that the defendant should have a lien. A lien would have no value which the debtor might at any time destroy by incurring a subsequent debt to a stranger. We think the defendant has the prior lien, and judgment will be in his favor according to the case agreed.

PER CURIAM. Judgment below affirmed, and judgment for defendant.

Cited: McCoy v. Wood, ante, 128.

G. W. CRAWFORD, administrator, etc., v. THOMAS LYTLE.

A makes his note to B, 7 June, 1857, and on 12 August, 1860, C endorses on the back "Pay the within to D," signing his name: *Held,* that C was not liable either as an endorser or guarantor, and that his endorsement merely passed the property in the note to D.

CIVIL ACTION (commenced in a Justice's Court, to recover the balance due on a note), tried before *Henry, Judge,* Fall Term, 1873, of the Superior Court of MCDOWELL.

The note sued on is in the following words:

"$475.87. One day from date, I promise to pay G. W. Lytle, four hundred and seventy-five dollars and eighty-seven cents, for value received, this 7 June, 1857.

JOHN BURGIN." [seal.]

On which note is endorsed: "Received on the within note, three hundred dollars, 8 October, 1859," and this further endorsement:

"Pay the within note to James Crawford, this 12 September, 1860. THOMAS LYTLE."

Plaintiff contends that Thomas Lytle, the defendant, is liable to him as an endorser; and by agreement, all other defenses being abandoned, whether or not the above endorsement rendered the defendant liable, was the only question to be tried. His Honor being of the opinion that it did, gave judgment for the plaintiff, from which judgment defendant appealed.

Gaither and *Bynum,* for appellant:

1. A mere writing of one's name across the back of a note executed by other parties cannot be more than a guarantee.

2. If A executes his promissory note to B, and C writes on the back of the note "Pay the within to D," he simply guarantees that if A does not pay it he will.

3. In this case if D fails to make the money out of A, and A is good, he cannot recover out of C, certainly not without notice.

4. If in the above case the endorsement of C was made at the time the note was given, he would be liable as endorsee, but only as a guarantee if done afterwards. Parsons Contracts (5 Ed.), 543.

In this case the note was not given at the time of the endorsement on the back of note, and the only promise of the defendant is to pay in case of the insolvency of the original maker, and it was admitted on the argument in the Court below that the money could have been made out of the original maker until after the war.

See *Dawson v. Petway*, 20 N. C., 531; *Thompson v. Sanders, Id.*, 539; *Baker v. Robinson*, 65 N. C., 191.

The damage to the defendant is the paying the money in case the plaintiff recovers.

(387)

Fleming and *J. C. Harris, contra.*

1. The instrument sued on is an ordinary promissory note under seal, and its endorsement by defendant is not a guaranty, but a suretyship. It is a negotiable security, and the defendant is liable as surety. Bat. Rev., chap. 10; *Johnson v. Hooker*, 47 N. C., 29.

2. If the defendant be a guarantor, and not a surety, he must show himself *damaged* by the alleged laches of plaintiff, or plaintiff may still recover. The mere allegation of damage is not sufficient. The defendant must show damage. *Farrow v. Respass*, 33 N. C., 170; *Baker v. Robinson*, 63 N. C., 191.

3. A guarantor differs from a surety, in this, that the former cannot be sued until a failure on the part of the principal when sued, while the latter may be sued at the same time with the principal. 10 Watts, 258. And under our law the holder of a promissory note can bring an action against the endorser without even making any demand upon the maker of the note. Bat. Rev., 104; and the endorser, unless it be otherwise plainly expressed, is liable to the holder as surety.

4. A guaranty is a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is primarily liable for such payment of performance; but the obligation which an ordinary endorsement of a promissory note imposes is not in the

alternative—the essential quality of a guaranty; and an action may be maintained against such endorser without joining the maker of the note, or requiring any payment or making any demand of him. Bat. Rev., 155; it being in the option of the plaintiff to include persons, severally liable on the same obligation, in the same action.

SETTLE, J. A makes his note to be paid on 7 June, 1857, and on 12 August, 1860, C endorses on the back of the note these words, to-wit: "Pay the within to D," and signed his name. Nothing more appears.

We are of opinion that C is neither an endorser, (388) according to the commercial law, nor a guarantee; but that his endorsement merely passed the property in the note to D, just as his bill of sale would have passed a horse. But if we adopt the most favorable view for the plaintiff, and consider C as a guarantor, there has been such laches on the part of the plaintiff as to discharge the defendant.

The judgment of the Superior Court is reversed, and judgment will be entered here that the defendant go without day.

PER CURIAM. Judgment reversed.

Cited: Southerland v. Fremont, 107 N. C., 570.

JOHN F. LOGAN v. J. C. PLUMMER.

1. Bonds given for the loan of money to A B, to be used in purchasing a forge, at which iron was to be made for the Confederate government, of which fact A B was duly informed, cannot be recovered.
2. The principle established in such cases is that wherever a dollar has been expended to destroy the life of the republic, it shall never return to the pocket of the owner.

(*Martin v. McMillan,* 63 N. C., 486; *Leak v. Comrs.,* 64 N. C., 132; *Setzer v. Comrs., Ibid.,* 516; *Critcher v. Holloway, Ibid.,* 526; *Kingsbury v. Gooch, Ibid.,* 528; *Smitherman v. Sanders, Ibid.,* 522, cited and approved).

CIVIL ACTION, to recover the amount of three several bonds, tried before *Mitchell, Judge,* at Spring Term, 1873, of the Superior Court of ASHE.

Of three notes sued upon in this action, two were for Confederate money, payable to Bogle & Jones, and the other for $500, given to A. M. Bogle, dated 5 May, 1864, payable in Confederate currency; one was for $1,935, and dated 6 May, 1864; the other, dated 7 August, same year, called for $1,200.

(389) The bonds were issued to the plaintiff.

Defendant stated that when he borrowed the money for which the bonds were given, he informed Bogle & Jones that he wanted the money to buy a forge to make iron for the Confederate government; that he was negotiating a purchase of the forge, and had to have the money to complete the trade; that he had sold his land on time, and his contract to make the iron rendered it necessary for him to have the money at once. Bogle & Jones furnished him the money at different times; he bought the forge and furnished the Confederate government with a quantity of iron.

Defendant further stated that afterwards, as he was passing Jones' house, he informed him that his money was ready for him, and perhaps was on the way to him, and that Jones told him to turn the messenger back, if he, the defendant, met him, and not to send him the money, but to keep it and invest it for him, Jones, in land or other property; if he could not do this, to keep it until he, Jones, called for it. That he, the defendant, endeavored to invest it, but failed, and the money became worthless on his hands. After the war Jones told defendant that he himself did not expect anything from defendant, but that Bogle would likely contend for it.

His Honor charged the jury that if Bogle & Jones knew that defendant was going to buy a forge with the money for the purpose of making iron for the Confederate government the contract would be illegal and void, and that the plaintiff could not recover.

That the instructions given to defendant by Jones, as to the investment of the money in lands or other property, as deposed to by defendant, would be an appropriation of the money by Jones, and the plaintiff could not recover.

Verdict and judgment for defendant. Appeal by plaintiff.

Folk, with whom was *Armfield* and *Busbee & Busbee,* for appellant, submitted the following:

The case presents two questions: (390)

1. Are the bonds void?

2. If not void, have they been satisfied?

1. The line between what contracts are void because in aid of the rebellion, and what are not void for that cause, is distinctly marked by the decisions in this Court. In *Martin v. McMillan,* 65 N. C., 199, *Pearson, C. J.,* says: "The fact of furnishing horses for the Confederate government was an act which, of itself, aided the rebellion, and amounted to treason; that was the ground of the decision." It was also the ground of the decision in *Smitherman v. Sanders,* 64 N. C., 22; *Turner v. R. R.,* 63 N. C., 522; *Robson v. Kingsbury,* 66 N. C., 524, and all the cases decided in this Court, except the salt cases, which stand on peculiar grounds. Loaning money to equip a military company, to hire a substitute, and conveying the officer to his command, were all acts of treason. In *McKesson v. Jones,* 66 N. C., RODMAN, J., said: "The farthest this Court has gone in holding a contract illegal because in aid of rebellion was in *Martin v. McMillan.* In the present case the aid given the rebellion is much more remote. It was not a sale of military material, nor even a sale of provisions to laborers engaged in making such material, but a lease of land upon which provisions might be raised to feed laborers engaged in an unlawful occupation." So in this case it may be said the unlawful act was not the direct result of the contract, but a loan of money which might be invested in land on which there was a forge which might be worked in making iron which might be sold to the rebel government. As was said in *McKesson v. Jones,* it is at least two steps removed from the principle of *Martin v. McMillan.* "It is possible," says RODMAN, J., in *McKesson v. Jones, supra,* "to foresee and calculate the direct consequences of an act, but if we attempt to follow it out into its indirect and more remote consequences, our reasoning becomes uncertain, and, after a few steps, altogether unsatisfactory." Many principles of law are based on this reasoning, and it is of almost constant application in the law of damages, arising from a breach of contract. It is submitted this case (391) is governed by *McKesson v. Jones.*

2. His Honor held that if the defendant was believed, the facts deposed to amounted to such an appropriation as dis-

charged the notes payable in Confederate money. It is difficult to perceive the idea his Honor intended to convey by the word appropriation. The word has two meanings in law. It is sometimes used to express the application of a sum of money to one of several debts due from the same debtor to his creditor, sometimes to describe the act of setting apart certain goods or chattels to the purpose of a contract, but in the connection in which it is here placed, it has no legal significance whatever. The transaction, if anything, was a payment. If a payment, it satisfied the debt; and if the debt was satisfied, the property in the specific sum of money required for that purpose, passed to the payees.

W. P. Caldwell, with whom was *Todd, contra*, argued:

1. The three notes are to be taken as one contract, made in May.

A bond for loaned money to hire a substitute, or with the knowledge it was to be used to hire a substitute in the Confederate army, is illegal. *Critcher v. Holloway*, 64 N. C., 526; *Kingsbury v. Gooch*, 64 N. C., 528; see also, *Smitherman v. Sanders, Ibid.*, 522; *Martin v. McMillan*, 63 (392) N. C.

If Plummer had borrowed the money to pay an illegal debt, it would not be illegal, as in *Poindexter v. Davis*, 67 N. C., 112; *Kingsbury v. Suit*, 66 N. C., 602; *Calvert v. Williams*, 64 N. C., 168.

2. As to payment: See *Simmons v. Cahoon*, 68 N. C., 168.

Settle, J. The jury have found the fact that all three of the notes in suit were given to Bogle & Jones for the loan of money, with the full knowledge on their part that the same was to be expended in the purchase of a forge at which the defendant was to make iron for the Confederate government. The forge was purchased with this money, and the defendant did "make and deliver to the Confederate government several tons of iron, a large quantity of which was known as gun scalps."

The line between such contracts as are tainted with rebellion, and therefore void, and those which are not so infected, is clearly marked by the decisions of this Court. The principle established is, that whenever a dollar has been expended to destroy the life of the republic, it shall never return to the profit of its owner.

To hold otherwise, would be to invite other rebellions.

A sells to an agent of the Confederate government mules, knowing that they are to be used in that service, but takes the individual bond of the agent, with personal security, for the payment of the price agreed upon. He cannot recover it. *Martin v. McMillan,* 63 N. C., 486.

Money lent during the rebellion to a county to enable it to provide salt for its citizens, and thus avoid one of the penalties of the blockade, cannot be recovered. *Leak v. Comrs.,* 64 N. C., 132; *Setzer v. Comrs., Ibid.*, 516.

A lends money to B with the knowledge that B intends with it to hire a substitute and put him into the Confederate army. A cannot recover the money. *Critcher v. Holloway,* 64 N. C., 526; *Kingsbury v. Gooch, Ibid.*, 528. (393)

Money is lent with a knowledge that it is to be used in equipping a company for the Confederate service. It cannot be recovered. *Smitherman v. Sanders,* 64 N. C., 522.

It is not difficult to perceive that the principle of the cases cited govern the case before us. For it is not easily imagined how one could render more efficient aid to the Confederacy, in 1864, than by furnishing it with iron, and especially iron suitable for making guns, thereby enabling the Confederacy to protract the struggle and counteract the measures of the government of the United States for the suppression of the rebellion.

The courts of the rightful government cannot countenance such contracts as the one before us, but will leave the parties, who are in *pari delicto,* where they stand.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Lance v. Hunter, 72 N. C., 179; *Brickell v. Comrs.*. 81 N. C., 243.

JOHN A. McDONALD *v.* L. J. HAUGHTON.

Courts of justice not only redress fraud, but seek to redress fraud by removing temptation. Therefore presidents and directors of railroad companies are not allowed to buy up and speculate upon claims against such companies—such contracts being in every respect against good morals, and consequently against public policy.

Civil action, tried before *Tourgee, Judge,* Fall Term, 1873, of Chatham Superior Court.

In his complaint the defendant alleges that the defendant having a claim against the Western Railroad Company amounting to $2,715.25 assigned it to him by the following instrument:

"21 January, 1870.

(394) "I hereby transfer my claim against the Western R. R. Co., to John A. McDonald in consideration of his note for twenty-five hundred dollars; if said note is not paid by 25 February next, then the above to be null and void and of no effect.

(Signed) "L. J. Haughton."

The execution of this assignment was admitted by defendant. It was also admitted, that the defendant was the owner of a claim against said road for $2,715, with interest from 1 February, 1864, and that the plaintiff from 12 November, 1869, to April, 1871, was a director in said railroad company.

The defendant, in his answer, principally relies upon the facts that the contract to pay the plaintiff the excess over $2,500 (the real amount involved in this action) was without consideration, and that said contract with a director of the company was against public policy, and that the assignment was obtained from him by the false and fraudulent representations of the plaintiff himself.

For the plaintiff, the secretary of the company stated (reading from the records of the company) that on 13 November, 1869, the plaintiff being present in the meeting, a resolution was adopted appointing T. A. Byrnes, J. W. Hopkins and T. S. Lutterloh a committee to investigate the claim of the defendant and others held by them against the company, the committee to report at the next meeting; that this committee reported 6 January, 1870, in favor of paying the claim of defendant, to-wit, $2,715, with interest from 1 February, 1864, the consideration of which report was postponed until the meeting to be held in Raleigh on 1 February, 1870, when it was concurred in (plaintiff being present) and the amount, including interest, ordered to be paid; that the books show that the amount was placed to the credit of the defendant.

The plaintiff, as a witness, stated that in the early part of February, 1870, he had a conversation with (395) defendant in Pittsboro, in which he asked defendant if he had heard that his claim against the Western Railroad Company had been allowed; defendant stated that he had; that after this, he (the plaintiff) met the defendant in Fayetteville some time previous to 25 February, 1870, and remarked to him, "I suppose you have received your money from the company"; that defendant replied, "I have got a part."

Upon his cross-examination the plaintiff stated that he was not certain that this conversation took place previous to 25 February, but it was his impression that it did; that when the defendant gave him the assignment, hereinbefore set out, he (the plaintiff) gave him his note for $2,500, due 25 February, 1870, and that the only conditions of the contract were those expressed in the assignment.

The defendant, as a witness in his own behalf, testified that the amount of his claim against the company was paid him 18 March, 1870, at the banking-house of Jones & Lutterloh in Fayetteville; that he received the money from the bank, and was certain as to the date from the entry in his pass-book, and that the amount paid him was $3,715, the same being principal and interest of his claim; that the plaintiff was not present, nor has he ever received one dollar from the plaintiff.

The defendant further stated that at the time he gave the assignment to the plaintiff, the plaintiff gave him his note for $2,500, and that the note, by its express terms, was to be null and void if not paid on or before 25 February, 1870, and that at the time he took the plaintiff's note conditioned as above, the plaintiff was notoriously insolvent and has so continued ever since; that shortly after 25 February, 1870, he put plaintiff's note in his pocket and went to Pittsboro for the purpose of handing it to plaintiff; that he did not see him, and the note, with other papers, was lost; that he had diligently searched for it, as he relied upon the condition contained in the same for a part of his defense set out in his answer, (396) and had therein offered to indemnify the plaintiff from any damage or loss he might sustain on account of such loss; that after the day of payment, 25 February, passed, he considered the note of no value; that he had received a notice from the plaintiff to produce it, etc.

Defendant then, for the purpose of showing that the contract (or assignment) made with plaintiff was against public policy and fraudulent, offered to prove by himself the following facts:

That on 19 January, 1870, the plaintiff and himself being in the city of Raleigh, the plaintiff came to his boarding-house and asked him what he was going to do with his (defendant's) railroad claim; that he (the defendant) replied "if he did not get his money very soon he intended to sue on it"; that plaintiff remarked "he hoped defendant would not sue the company"; that he again stated to plaintiff he should certainly sue if the money was not paid, and that he had been advised by his lawyers to pursue this course. The plaintiff thought the matter could be compromised, and, upon being asked how, replied that he thought he could get $2,500 for it in a short time; that he (the defendant) stated to plaintiff he would not take $2,500, as the principal itself, without interest, was $2,715, to which plaintiff said "that I could not possibly get the interest; the board of directors were determined not to pay interest on any claim"; that to this he (the defendant) replied "he thought it strange that the board should pay the principal and refuse to pay interest," and asked the plaintiff what would become of the $215 if the proposition to receive $2,500 was accepted? Plaintiff replied, "Well, you will have to give that to Byrnes, who was chairman of the auditing committee, to get him to pass upon your claim." Defendant said he thought it strange the board would keep a man in office who would not pass a just claim unless he was paid for it, and that as the plaintiff helped to put him into office he ought to help to put him out. To this plaintiff said "You know how it is," and hoped that he would take the $2,500, saying that defendant could lose only (397) $215, which he had rather pay than for the company to be sued.

On the 20th, the next day, this conversation, in substance was repeated, the plaintiff coming to defendant and urging him to accept his proposition; that the defendant stated to him "that as you (the plaintiff) assure me, the directors have determined to allow no interest, and you are a director, and as I am in need of money, I will take for my claim $2,500, *provided* it was paid by 25 February, 1870," and thereupon the assignment was made and the note of plaintiff drawn up and given to defendant.

The evidence (of defendant in relation to what passed at the time of executing the assignment and note) was rejected by the Court upon the ground that this was a matter between the company and the plaintiff, and was not against public policy. Defendant then offered the same evidence for the purpose of proving false and fraudulent representations on the part of the plaintiff of a fact peculiarly within his, the plaintiff's, knowledge, and constituting a material inducement to making the contract, viz.: that the directors would not allow interest, etc The evidence was again rejected by the Court, on the ground that there was no allegation of fraud in the answer to support the introduction of such testimony.

To both of which rulings of his Honor defendant excepted.

Defendant then proved by one of the firm of the banking-house of Jones & Lutterloh that he was paid his debt against the railroad company on 18 March, 1870, out of the funds of the bank, or the private funds of Jones. Plaintiff objected to the witness stating who paid the money, as the defendant in his answer had alleged that it was paid by an officer of the company. The objection was sustained, and the evidence upon that point ruled out. Defendant again excepted.

Among several instructions to the jury asked of the Court by the defendant, which are not pertinent to the point upon which the case was determined in this Court, and are not considered in the opinion of the *Chief Justice,* (398) the defendant asked his Honor on the trial to charge the jury:

5. "That the contract between the plaintiff and defendant was void, against public policy, and that the plaintiff could not recover."

This instruction was refused, and his Honor charged that the contract between the plaintiff and the defendant must be gathered from the two papers, the assignment and the note; that if they found the terms of the contract to be as stated by defendant, then time was of the essence of the contract and plaintiff could not recover, unless it was proved that the plaintiff had either himself paid or the company had paid off the note for $2,500 on or before 25 February, 1870. And by consent his Honor submitted the following issue in writing to the jury, as covering all the case not otherwise admitted or previously ruled upon:

"Has the plaintiff paid the defendant the consideration mentioned in the instrument sued upon?"

The jury found the issue in the affirmative in favor of the plaintiff.

Motion by defendant for a new trial; motion refused. Judgment for plaintiff and appeal by defendant.

Haughton and *Manning,* for appellant.
Batchelor, Edwards & Batchelor and *Headen, contra.*

Pearson, C. J. The defendant offered to prove that he had claims against the railroad company (in round numbers) of $2,700 for work done; that he had been pressing this claim upon the directors from year to year since 1864, and was put off on one pretext or another; that in January, 1870, when his claim, including interest, amounted to $3,700, the plaintiff, who was one of the directors, offered him $2,500 for his claim saying that Byrnes and others of the directors were determined not to allow interest, whereupon the defendant agreed to let plaintiff have his claim for $2,500. Soon
thereafter an order allowing his claim was passed by the directors and he was paid the whole amount, $3,700. This action is brought to recover the excess of the amount received by the defendant upon his claim over the sum of $2,500. His Honor rejected this evidence, on the ground that "this was a matter between the company and the plaintiff, and not against public policy."

There is error.

The plaintiff sues for $1,200. What has he paid for it? Not one cent. If the claim of the defendant was fair, the plaintiff as a director ought to have allowed it; if it was dishonest, it ought to have been rejected; but what has the plaintiff done to earn $1,200? "There is the rub." He has used his influence to have a claim allowed and paid by the board of directors, and now asks to have judgment for one-third of the amount because the defendant had agreed to let him have all that was allowed upon the claim over and above $2,500 "for his influence in getting the claim allowed and paid."

Whether he bought up Byrnes by paying him his price, or is seeking to appropriate the entire $1,200 to himself, the transaction is in every point of view against good morals, and consequently "against public policy," and not fit to be enforced by a court of justice. The doctrine rests on the principle that courts not only redress fraud, but seek to prevent it by removing temptation. A trustee or administrator is not allowed to buy at his own sale. Why? Because he would be led into temptation to underrate the value of the property or to take advantage in some other way.

If an executor or administrator takes up a claim against the estate for less than the amount due on settlement he is allowed only the sum actually paid. Why? Because otherwise there would be temptation to misrepresent the state of the assets, and put difficulties in the way so as to force creditors to submit to loss.

On this principle presidents and directors of railroad companies are not allowed to buy up and speculate upon claims against the company. Why? Because there (400) would be temptation to misrepresent the creditor of the company, to make false statements as to the note in regard to interest, and to put off a claimant under one pretext or another (as the defendant offered to prove in this instance) until he is harried down and agrees to accept two-thirds of his debt and let "a director" have the other third.

Had the plaintiff openly and above board, as a purchaser, received the amount of the claim, it would have been difficult for the defendant to make him pay more than the $2,500 for which he held the note. But plaintiff did not see proper to avow himself as a purchaser, probably because then the profit of the speculation would have inured to the benefit of the company, or other directors might have insisted upon having a share of the spoils. As the money has thus got into the hands of the defendant, there is no principle on which a court of justice can aid the plaintiff in his attempt to recover one-third of it.

A director, for the purpose of speculation, buys a claim against the company, or rather he stipulates that he is to have all over a sum certain, provided the claim is allowed and paid in a given time; so he is made a judge in his own case and "is led into temptation."

That such "actings and doings" on the part of presidents and directors of railroad companies violate good morals, and are against public policy is a question which we will not discuss.

His Honor took the narrow view, "the matter is one between the director and the company." Not so; the matter is one between the honest and dishonest portions of the body politic. This, of course, involves a question of public policy; and the courts will not enforce the performance of a contract against good morals.

PER CURIAM. *Venire de novo.*

(401)

ISAAC JARRATT and W. W. LANG, administrators, etc., *v.* H. C. WILSON, administrator, etc.

A enters into a covenant to purchase of B certain lands at the price of $2,500, to be paid by the surrender to B of a note held by A against him for $1,700, payable in specie or its equivalent, and A promising to pay (or secure) the balance of the purchase-money for the land to C.: *Held,* that A was not entitled to any premium on the note for $1,700 agreed to be surrendered, as by the agreement to surrender the value of that note as well as the price of the land was determined by the parties.

CIVIL ACTION (covenant on a sealed instrument), heard before *Cloud, J.*, upon exceptions to a report of a referee, at Spring Term, 1873, of YADKIN Superior Court.

The facts in the case are fully set out in the opinion of the Court.

His Honor, upon the hearing below, allowed the exceptions of the defendants, modifying the same, giving judgment accordingly. From this judgment both plaintiffs and defendant appealed.

Armfield and *McCorkle & Bailey,* for defendant.

Brown, Masten and *Batchelor, Edwards & Batchelor,* for plaintiffs.

BYNUM, J. The defendants' intestate purchased of the plaintiff's intestate all his interest in a certain tract of land, and in payment therefor executed the paper-writing of which the following is a copy, viz.:

"Know all men, that I, W. A. Joyce, have this day bought L. Lynch's interest in the Lynch & Halcombe mill for twenty-five hundred dollars, which I am to pay in the following manner, to-wit: I am to deliver up to said Lynch a note which I hold on him for near seventeen hundred dollars, and I am to pay balance for Lynch to Grimes Halcombe, or (402) to secure the same to said Halcombe in some satisfactory manner. W. A. JOYCE. [L. S.]

"19 May, 1865."

The note referred to in the above bond was set up by defendant as a counter claim, of which the following is a copy, viz.:

"One day after date, I promise to pay W. A. Joyce, or order, $1,777.65, for value received, with interest on $1,442.79 thereof from 4 December, 1863, to be paid in specie or its equivalent, as that note is given for a specie note which was made before the war. L. LYNCH. [L. S.]

"13 February, 1865."

Upon the pleadings the case was referred to a commissioner to take an account and report. In the report the commissioner allowed the said note and interest thereon as a credit upon the plaintiff's demand, to which the defendant excepted, for that the commissioner had not allowed him the premium on said note as a specie note and as of the date of the note.

Upon hearing the exception, his Honor sustained it to the extent of allowing premium on the note as of the date of taking the account, to-wit, 25 September, 1871. Both parties, being dissatisfied with the ruling of his Honor, appealed to this Court.

The question presented is, not what was the value of the $1,700 note under a *former* contract between the parties when it was executed, but it is what is the proper construction of *another and different contract,* to-wit, that set forth in the covenant sued on. The *legal* value of the note is one thing; the *contract* value, as established by the covenant, is another. It is plain that the parties had in view and applied the same standard of value in fixing the price of the land and (403) the price of the note, nothing appearing in the covenant of sale to the contrary.

The plaintiff agrees to take $2,500 for his land without specifying the currency; the defendant agrees to deliver in payment a note of a nominal amount without specifying the currency. If the defendant had performed his part of the contract by immediately surrendering up the note it would have extinguished the plaintiff's demand to the nominal value only of the note, there being no stipulation in the covenant for taking it at another and greater value than in the words of the covenant, "near seventeen hundred dollars." The parties themselves thus fix the price of the land and the price of the note in the covenant, and are concluded in the absence of any proof of a contrary intent.

This covenant was entered into on 19 May, 1865, at a time when Confederate money had ceased to be a currency, and no other had appeared to supply its place. The inference would be that both parties made as the basis of their trade the only standard of value then known to them, to-wit, specie.

Judgment reversed, report confirmed and judgment according thereto.

PER CURIAM. Judgment accordingly.

Cited: Jarratt v. Wilson, post, 404.

ISAAC JARRATT and W. W. LANG, administrators, etc., *v.* H. C. WILSON, administrator, etc.

(The syllabus is the same as the preceding case, same title).

THIS case is the same as the foregoing one, only brought to this Court upon the appeal by plaintiff.

The facts are fully stated in the opinion delivered by *Justice Bynum* in the case of the same title, next preceding.

Brown, Masten and *Batchelor, Edwards & Batchelor,* for plaintiff. (404)

Armfield and *McCorkle & Bailey,* for defendants.

BYNUM, J. The facts in this case are stated in *Jarratt v. Wilson, ante,* 401.

The commissioner allowed the $1,700 note and interest thereon, and the plaintiff excepted thereto because the premium for specie was not allowed thereon. Upon the hearing, his Honor allowed the exception to the extent of the premium on specie as of the date of taking the account, and the defendants appealed.

For the reason assigned in the other branch of this case there was error.

Judgment reversed and judgment against appellant for cost of this Court.

PER CURIAM. Judgment according to report, and against appellant for costs.

WILLIAM SAMPSON *v.* THE ATLANTIC and N. C. RAILROAD CO.

In an appeal to this Court it is the duty of the appellant to cause to be prepared a concise statement of the case, embodying the instructions of the Judge as signed by him, if there be any exceptions thereto, and the requests of the counsel for instructions, if there be any exception on account of the granting or withholding thereof, and stating separately in articles numbered the errors alleged. The appellant cannot except to the charge of the Judge on the trial below for the first time in this Court.

CIVIL ACTION, tried before *Clarke, Judge,* at Spring Term, 1873, of the Superior Court of CARTERET.

(405) This action was brought against the railroad company by the plaintiff, an employee of the road, for damages received while performing his ordinary duties on the road.

The evidence sent up as a part of the record not being pertinent to the point on which the case was decided in this Court, need not be recited. His Honor, on the trial, charged the jury that the "servant or employee of a railroad company injured in the line of his duty in the performance of his usual business, cannot recover damages for an injury received while so engaged except in case of gross negligence. The company is not responsible for damages received by an emplayee working with others in consequence of the act or neglect of his fellow-servant, as it is presumed that when he undertakes the business he takes the risks incident to it.

"If the evidence satisfies the jury that there was gross negligence on the part of the defendant, and that the plaintiff did not, by his acts or default, contribute to the injury, then if he was injured the company is responsible."

The jury gave the plaintiff as damages $50 and the amount of his physician's bill. Judgment accordingly and appeal by defendant.

Lehman and *Battle & Son*, for appellant.
Haughton, contra.

READE, J. His Honor charged the jury, that the plaintiff could not recover unless there was gross negligence on the part of the defendant. Nor could he recover if he contributed to the negligence. This was putting it very strongly against the plaintiff.

To this charge the defendant did not except nor did he ask for any other charge. The case therefore comes up to us without any exception whatever And the exception is taken for the first time upon the argument here that his Honor did not charge the jury what is negligence in law. The exception comes too late. C. C. P., sec. 301, prescribes that the appellant "shall cause to be prepared a concise statement of the case, embodying the instructions of the Judge, assigned by him, if there be any exception thereto, and the requests of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged." In the record and in the case sent up there is no exception to the charge, as given and no request for any other charge, nor is any ground assigned for a new trial. If there was any error it was but just to the Judge that his attention should have been called to it in order that he might have corrected it, and the law requires that it should have been. We are reasonably indulgent of mere irregularities in cases sent up if we can get at the merits, but we cannot allow cases to be flung at us in disorder in the hope that some advantage may be gained by accident, or that we will pass by all errors on the part of the appellant in order to get at errors on the part of the appellee. The burden is upon the appellant. (406)

There is no error.

PER CURIAM. Judgment affirmed.

Cited: White v. Clark, 82 N. C., 8; *Bost v. Bost.* 87 N. C., 482.

JAMES NEIGHBORS, assignee of J. SANDERS and wife ELIZABETH *v.* ALLEN JORDAN, Administrator of LEN. HUTSON.

In a suit to recover a distributive share in an intestate's estate, it is not necessary to prove that the person paying such share to the agent of the distributee was, at the time, rightful administrator; and evidence to prove that such person paid the distributive share to the agent, is clearly admissible.

CIVIL ACTION (commenced by *capias* in June, 1866), tried before *Tourgee, Judge,* Fall Term, 1873, of the Superior Court of RANDOLPH.

(407) John Sanders and wife, Elizabeth, assigned by deed all the right of the said Elizabeth to a distributive share in her father's estate (one-fifth thereof) to the plaintiff, reciting in the deed that they had theretofore made Len Hutson, the intestate of the defendant, their attorney to collect such distributive share, and alleging that he did collect it and failed to pay it over.

On the trial below the plaintiff submitted to a nonsuit because of the rejection of certain evidence offered by him, and appealed.

The evidence and exceptions and rulings of the Court below are fully set out in the opinion of *Justice Bynum.*

L. M. Scott, for appellant.
McCorkle & Bailey, and *Dillard* and *Gilmer, contra.*

BYNUM, J. This was an action on the case begun prior to the C. C. P. to recover from the defendant as administrator of Leonard Hutson, deceased, the distributive share of one Elizabeth Sanders, to-wit, one-fifth part of the estate of her father, John Hutson, which the plaintiff alleged had been collected by the intestate of the defendant under a power of attorney from said Elizabeth, and which she had assigned by deed to the plaintiff.

It will not be necessary to notice all the exceptions taken by the plaintiff on the trial, as his Honor's ruling upon two of them will entitle the plaintiff to a *venire de novo.*

1. After proving the deed of assignment to the plaintiff

one Sanders was introduced as a witness, and plaintiff offered to prove by him that he was the administrator of John Hutson, and as such paid over to Len Hutson, in 18—, the distributive share of John Sanders and wife in the estate of John Hutson. This evidence was objected to and ruled out by the Court.

2. The plaintiff then offered to prove by the same witness that he paid a certain sum of money to the said Len Hutson, to-wit, $72.59, for Elizabeth Sanders, her distributive share in John Hutson's estate. This evidence was (408) also ruled out on objection by defendant.

1. First exception. It was not material to the plaintiff's recovery that he should establish any legal administration in Sanders, for an *executor de son tort* is one who intermeddles with an estate, and when he thus becomes an executor of his own wrong he is affected with all the liabilities and can perform all the legal duties of a rightful administrator. He can, and must pay the debts of the estate, and he becomes liable for all legacies or distributive shares and can be sued for them. So, he is protected by law in all payments made, or legacies discharged by him, in the rightful course of administration, in all cases where the assets are sufficient to pay all the debts. 1 Williams Exrs., 237, 238.

It was, therefore, necessary only for the plaintiff to prove by the witness, Sanders, that he took the estate in possession and paid over to Len Hutson, the agent of Mrs. Sanders, the share which was due her. If Hutson, who, it was admitted, was duly empowered to receive it, did receive her distributive share from Sanders as administrator it was immaterial whether he was the administrator or was *executor de son tort,* or was neither. The true enquiry was, did Len Hutson, the agent, receive the distributive share of Mrs. Sanders *as her distributive share* in John Hutson's estate from anybody? If so, surely that agent is bound to pay it over to the rightful owner, and is estopped from contesting the authority of Sanders to pay him. If the plaintiff elects to hold the agent liable, as having rightfully received the share which was due him, the defendant cannot escape by such an evasion. If Sanders, as *executor de son tort,* had been sued for her share of the estate by Mrs. Sanders, he could have successfully defended himself by showing that he had paid it to her agent.

So if the rightful administrator had been sued, he could defend by showing that she or her agent had received her distributive share of the estate out of the assets of the estate from one who was at the time *executor de son tort.* (409) This results from the rule that the latter person is protected in all acts, not for his own benefit, which a rightful executor may do. 1 Williams Exrs., 232, 233.

2. Second exception. It was certainly competent for the witness to prove that he paid Len Hutson, the agent, a certain sum of money in satisfaction of the distributive share. It was evidence, to pass for what it was worth, and in connection with the proof involved in the first exception, which we have just discussed, it was sufficient to make out the case, provided a demand had been shown. The plaintiff may establish a demand on another trial; without it, he cannot recover.

His Honor seems to have been misled by the counsel of the plaintiff, who were themselves misled by the idea that their recovery depended upon showing a rightful administration in Sanders, whereas that fact was not in issue, and not necessary to be proved, but was collateral to the real question, to-wit, whether the intestate of the defendant, as agent, had collected the share due the plaintiff. If he had, he has no right to retain it as against the true owner.

There is error.

PER CURIAM. *Venire de novo.*

HENRY C. WILLEY *v.* JOHN GATLING, Public Administrator, etc., and others.

1. T sues B on a note which he swears he obtained from C under the following circumstances: C hands the note to A, telling him to collect it if possible and from the proceeds pay himself $800, being the amount of a note held by A against C, and pay over the balance to him, C: *Held,* that the charge of his Honor below, that if they believed the above statement of A, the plaintiff, he had such an interest in the note as entitled him to recover, was right, and that the defendant was not entitled to a new trial for misdirection.

2. *Held further,* that the charge of his Honor, on the issue as to whether the note had been paid, that if they believed the defendant they should find the note paid; but if they believed the plaintiff they should find the note had not been paid, was unsatisfactory and improper, on account of which the defendant is entitled to a new trial.

CIVIL ACTION, tried Spring Term, 1873, of Superior Court of GATES, before *Watts, Judge.*

The facts involved in this action are thus stated and transmitted to this Court by his Honor as part of the record.

1. On 10 August, 1858, one Jacob Alphin, being indebted to R. H. L. Bond in four notes of $1,100.06 each, of date January, 1856, to which John Boothe and John Alphin (the testator of the defendants, John Alphin and Costen Jordan) were sureties; one of which notes had a credit of $1,052 thereon endorsed; and being further indebted to Jacob Hinton, the intestate of the defendant, John G. Gatling, in four other notes of $1,000 each, of date 21 January, 1858, to which the said Bond and John W. Hinton were sureties; and also indebted in other sums due other persons, but over which the eight notes above set out had priority of payment, made a deed in trust conveying to Shadrach W. Worrell two lots in the town of Gatesville, known respectively as the U. S. Hotel lot, containing about twenty acres of land, and the Hotel stable lot, together with certain personal property, particularly described in the deed, for the purpose of (411) paying his debts and saving his sureties harmless.

The trustee, Shadrach W. Worrell, was empowered to sell either publicly or privately the property conveyed and apply the proceeds in payment of the said eight notes.

2. The personal property, with the exception of a quantity

of hotel furniture, still in the possession of the defendant, John Brady, was lost by the results of the war.

3. On 1 November, 1858, the trustee sold the property conveyed, or so much of it as was not lost, real and personal, to the defendant, Brady, for the sum of $9,500, receiving in payment a lot in Gatesville, which was valued by the trustee and Brady at $1,000 (and the title to which was taken to the defendant, Worrell, individually), and four bonds executed by Brady for $1,150 each, payable 15 January, 1860-'61-'62 and 1863, respectively, and three other bonds, each for the sum of $1,300, payable 14 January, 1859-'60 and 1861, respectively, all bearing interest from the said day of sale, 1 November, 1858. To secure the payment of these notes the purchaser, Brady, re-conveyed the property to Worrell, the first trustee, in trust, etc.

4. Three of the notes due by Alphin, and to which Boothe and John Alphin were sureties, were purchased from Bond, the payee, by the defendant, David Parker, for himself; and the remaining note of that class was bought by him as agent for his brother, the defendant, James W. Parker, before the execution of the deed in trust. Of the four notes due to Jacob Hinton one was sold by him to Jacob Parker, two others to the plaintiff, and one seems to have been paid to him by the trustee.

5. Of the notes given to Worrell, the trustee, by Brady, for the purchase of the trust property, the three for $1,300 each were paid at maturity in money; and so also was one of the $1,150; a second of these was paid in 1863 in Confederate money; a third was taken up by Brady during the war upon his surrendering to the trustee one of the notes due Bond, which Brady had purchased from Parker, the (412) first purchaser as aforesaid, for the purpose and with the consent of the parties, and the fourth was taken up by surrendering to the trustee one of the said notes payable to Jacob Hinton, and by him sold to Parker, and obtained by Brady under circumstances hereinafter described; whereupon, the trustee conveyed to Brady the trust property absolutely.

6. Of the notes due Bond and purchased by David Parker one was paid in full, as was also the balance of a second, after allowing the credit before stated of $1,050, or about the com-

mencement of the war; the third was paid to David Parker by Brady, under the circumstances before recited, who also paid on the fourth note the sum of $350, 10 April, 1860, to James H. Parker, this last being sued on in Gates Superior Court, 1868, and judgment obtaind thereon. This, too, has been paid in full by the executors of the surety, John Alphin, the only solvent obligor.

In 1868 the condition of the trust fund and the notes primarily secured in the trust was as follows:

The trustee, then resident in Baltimore, and insolvent, still held in his hands one only of the notes given for the purchase of the property by defendant, Brady, for $1,150 and interest. Of the notes secured by the trust, David Parker, another defendant, held as his own property, one of the four, payable to Jacob Hinton, for $1,000 and interest. The sureties in this note at the time were insolvent. Parker also held, as agent of his brother, the defendant, James H., one of the Bond notes for $1,000 and interest, one of the sureties to this being solvent. The plaintiff, Willey, partly in his own right, and partly for Jacob Hinton, held one of the notes payable to said Jacob Hinton for $1,000 and interest. All of the rest of the eight notes had been paid, or otherwise taken in, except one of the Jacob Hinton notes, also then held by the plaintiff, but which at the first trial of this action the jury found to have been paid in Confederate money in 1863.

In the summer of 1868 the defendant Brady, having solicited of David Parker a loan sufficient to pay off the balance due in his purchase of the trust property, so (413) that he could procure an absolute title to the same, was informed by Parker that he had no money that he could lend, but that he did have one of the Jacob Hinton notes. He, Brady borrowed this note of $1,000, giving in exchange therefor his individual note without security, and that he and Parker went to Baltimore, surrendered this, the Hinton note, to the trustee, and took up his own $1,150, the only part of the trust funds then in the hands of the trustee; whereupon the trustee made Brady a deed for the property he had theretofore purchased. On their return Brady and Parker had a settlement, and Brady gave him his individual note for the amount due him (Parker), including the amount of the Hinton note, borrowed as aforesaid. On this note Parker brought suit, and at the return term obtained judgment for want of a plea, execution issued, and under it, and others against Brady, the whole controlled by David Parker, the property bought of the intestate and all the other property of Brady was sold and purchased by Parker. The plaintiff was present at the sale and read a written notice of his claims on the trust property.

At Fall Term, 1869, the plaintiff brought suit, alleging his possession and ownership of the two notes, secured as hereinbefore set forth by the trust made by Alphin, and charging, in substance, the facts above stated, and praying for an adjustment and settlement of all the equities arising under the said deed of trust, and for other relief, etc. At Spring Term, 1871, the case was submitted to a jury by his Honor *Judge Pool,* who left the question of payment to their decision under the evidence. He charged, that if there was any understanding or knowledge or agreement between Brady and Worrell, or any two of them, that the trustee should apply the payment made to him to the notes of the testator held by one creditor, to the exclusion of those held by another creditor, to the prejudice of the latter, such notice or agreement would constitute collusion.

The plaintiff requested his Honor to charge that, (414) upon the facts ascertained, and not controverted, the question of fraud was one of law, and that upon the facts set up by the defense there was such collusion and constructive fraud as to prevent either the defendant Brady, who purchased under the trust, or the defendant Parker, who purchased under the execution against Brady, with notice of the plaintiff's claim, from holding the trust property discharged from the equities created by the trust and still outstanding. His Honor refused to give the instructions, but charged as before recited.

The jury found, first, that both the notes of the plaintiff had been paid by the trustee; second, that there was no collusion between the defendants.

Upon this verdict there was a judgment and appeal to the Supreme Court.

The Supreme Court, without rendering an opinion upon the refusal of his Honor to give the instruction asked, or upon the charge as made upon the question of fraud and collusion, directed that the plaintiff should have leave to move for judgment upon the second note described in the complaint, notwithstanding the verdict of the jury; and that the defendant, Shradack W. Worrell, should have leave to re-plead in case he should so elect.

Upon this being certified to the Court below, the plaintiff moved for judgment upon his second note and the defendant Worrell asked leave to re-plead. The motion of the plaintiff was denied, and the defendant Worrell was allowed to re-plead, alleging in his repleader payment of the said second note.

Upon the trial at Spring Term, 1873, the following issues were submitted to the jury:

1. Has the plaintiff such an interest in the second note described in the complaint as enables him to maintain this action?

2. Has the said second note been paid?

On the trial the plaintiff testified that he had received the note from the payee, Jacob Hinton, in the summer of 1866, and had held the same ever since as his own. (415) That it was handed to him at the house of said Hinton by himself, or his wife in his presence, and by his direction, under an agreement that the plaintiff was to take and collect the note if he could. If collected the plaintiff was to allow $800 in part payment of the notes he held against Hinton and credit them therewith, and pay over any excess to Hinton or as he should direct. That he had never applied to the defendant, Worrell, for payment of this note since he held it nor spoke to him about it until after bringing this suit, giving as a reason for not making the demand that Worrell had moved to Baltimore before the delivery of the note to him and resided there up to the bringing of the action. That no money or consideration, other than that stated, was given for the note, and it was transferred by delivery and without endorsement or assignment in writing, and that no credit had ever been put on any notes of said Hinton belonging to witness.

Mary Hinton, widow of said Jacob Hinton, for the plaintiff, stated in her deposition, which was read, that she first saw the note in the summer of 1862 and saw it last in 1866, when it was taken out of the box which contained her late husband's valuable papers, at his house by her, under his directions, and handed to the plaintiff as testified to by him; that it was then clean and nice. That she did not know the date, amount, or the name of any of the parties who signed it, but did know the note from its general appearance and from having heard it read. That no money was paid at the time, and nothing said about the terms of transfer to the plaintiff. (The note was not shown to witness when she was examined).

The deposition of the defendant, S. W. Worrell, taken just before his death, was then read in evidence, in which he testified that according to his recollection he had paid off this note, and taken it up and filed it among his papers relating to his administration of the trust funds; and that it was in his desk at his store in Gatesville, with other valuable papers and his account books, at the time of the visit of the Federal (416) troops to that place during the war; that the desk was broken open by the troops, his papers pilfered and carried off or destroyed, and he had his memory only to rely on as to these transactions and his dealings with the trust fund.

The defendant Brady testified as to the fact of the visit of the Federal troops to Gatesville and the pillage of Worrell's store and County Court Clerk's office, and that many papers belonging to the latter were afterwards found in the streets.

On the trial the defendant insisted:

1. That the plaintiff was not entitled as assignee or owner of the note to maintain an action therefor in his own name.
2. If he could maintain an action he was only entitled to recover the sum of $800, or a part thereof.
3. That upon the evidence, and in reconciling the same, the note had been paid and taken up by Worrell, and had been picked up by some one unknown and carried and delivered to Jacob Hinton, and the jury should so find.

The defendant submitted certain instructions which he asked the Judge (before commencing his charge) to give to the jury; this his Honor declined to do.

In the course of the argument the plaintiff's counsel read and commented on certain parts of the answer of Worrell as originally put in; to which the defendants objected upon the ground that he could not select and read parts only without also reading the whole answer. These objections were overruled by his Honor, who remarked that defendants' counsel could, if he choose, read the omitted parts of the answer on their argument to the jury—which was done.

The Court charged the jury, among other things:

1. That if they believed the facts testified to by the plaintiff he could maintain the action.

2. That if the jury believed the evidence of Worrell, they should find the note to have been paid; but if they should believe the evidence introduced by the plaintiff, they should find that it had not been paid.

The jury returned as their verdict: First, that the plaintiff did have such an interest in the said note as (417) would enable him to maintain the action; second, that the said note had not been paid.

From the ruling and charge of his Honor, as above set forth, the defendants appealed.

Upon the foregoing finding of the jury the Court delivered the following judgment:

1. That the trustee, Worrell, had no power under the deed in trust to exchange the property conveyed for other property; and that the deed in trust being registered, the purchaser, the defendant Brady, was affected with notice of the trustee's powers, and therefore, in conveying the lot mentioned as part payment of the purchase-money for the trust property, he, Brady, became a party to the breach of trust; and the trustee having subsequently wasted the fund the trust property is subject in Brady's hands to the extent of $1,000, with interest from 1 November, 1858, to be applied to the satisfaction of so much of the original trust debts as may be outstanding.

2. That the defendant Brady, who purchased the trust property, having undertaken to satisfy portions of the trust debt without the intervention of the trustee, thereby substitutes himself as trustee to the extent of rendering the trust property in his hands liable to payment of those creditors secured by the trust, whose equal right to the fund has been disturbed by payments made by him as aforesaid; and he must now pay from the trust property to the unsatisfied trust creditors a sum sufficient after the application of the aforesaid $1,000 and interest, to make their benefit under the trust equal to any creditor to whom he, Brady, has made payments.

3. That the transactions which in the summer of 1868,

between the defendants Brady and David Parker, whereby, by permitting said Brady to use one of the trust notes then owned by defendant Parker, said Brady was enabled to procure to himself the title to the trust property, and by confessing judgment on the notes made by him to Parker for such trust note Parker was enabled to have the trust property sold to satisfy the debts due him from Brady, was (418) such collusion in law as renders him liable to contribute from the amount then due by Brady to the trustee on his purchase of the trust property, to-wit, the sum of $1,150, with interest from said 1 November, 1858, and which by said transaction was applied to the only payment of said Parker to the unsatisfied creditors of the trust fund until their benefit from said amount then due as aforesaid shall be equal to that received by said Parker.

4. That the executors of John Alphin, deceased, the defendants Costen Jordan and John Alphin, having in greater part paid the trust note held by David Parker as agent of the defendant, James H. Parker, are subrogated to his rights as a creditor of the trust fund, and are to be considered, to the amount of their said payments, as such creditors.

5. It was the duty of the trustee, in the summer of 1868, when the only part of said trust fund then remaining in his hands was the said sum of $1,150, due by Brady as aforesaid, to take an account of the indebtedness of the fund, and to have divided such remainder equally among all the creditors unsatisfied; and any creditor having received, directly or indirectly, a larger share of said fund than that to which under such equal distribution he was entitled, must contribute to those whose equality of payment has been distributed, until that equality is restored.

6. It is further the opinion of the Court that the said deed in trust, having been made for the purpose of saving harmless the sureties to said debts, as well as the payment thereof; and the defendant, David Parker, having in his hands in the summer of 1868, one of said trust notes for $1,000 with interest, the sureties to which were all insolvent, and having in his hands as agent of his brother, the defendant James H. Parker, another of said notes for $1,100, upon which a payment of $350 had been made, one of the sureties to which was solvent, to-wit, the testator of the defendants, Costen Jor-

dan and John Alphin, the defendant David Parker should have applied any benefit received by him from (419) the trust fund, whether directly or indirectly, to the *pro rata* payment of both notes; and to this extent he was, in equity, a trustee for the benefit of such sureties, and could not by any action, however circuitous, apply the whole fund to the insolvent note and collect the entire amount of the other note from the solvent surety; and the said executors having paid the entire amount under a judgment at law, David Parker must now pay to them their *pro rata* share of said fund as aforesaid.

7. The defendant, David Parker, having bought the trust property, under his executions against the defendant Brady, with full notice, the said property is still liable in his hands.

It is therefore ordered by the Court, that . . . . . . be appointed commissioner, who will take into his hands all the said trust property, and after making advertisement according to law, prescribed in making sales under execution, shall sell the same on such terms as may seem to him best, and make report to this Court of what he shall do under this order.

It is further ordered, that the said . . . . . . state an account:

1. Of all indebtedness now outstanding which was secured by said trust deed of 10 August, 1858.

2. The amount of such indebtedness, after applying the proceeds of sale of said property to be made by him as aforesaid, to the extent of $1,000, with interest, the value of the lot conveyed to the trustee by the defendant, Brady.

3. The amount of such indebtedness, after further applying the proceeds of said sale to an amount equal to all payments made to any of the creditors by the defendant, Brady; and in ascertaining such payments the commissioner will consider the notes claimed by defendant, David Parker, to have been sold or loaned by him to the defendant, Brady, as payments made by Brady.

4. The amount of the trust fund remaining in the hands of the defendant, S. W. Worrell, at the time of the last of the notes executed to him by the defendant, Brady, was surrendered to Brady, and the title to the property re-conveyed to him. (420)

5. The amount of the trust notes held by David Parker, whether in his own right, or as agent of his brother

aforesaid, at the time he claimed to have sold one of the trust notes of the defendant, Brady, in or about the summer of 1868.

6. The total amount of payments made on the trust note held by the defendant, David Parker, as agent of his brother, by the defendants, Costen Jordan and John Alphin, as executors of John Alphin, deceased.

In stating the amount of said indebtedness the commissioner will consider the payments made by said executors as a part thereof.

After taking such account the commissioners will report, etc.

Appeal by defendants, as hereinbefore stated.

Smith & Strong, for appellants.
Moore & Gatling, contra.

READE, J. Among other defenses set up in the answer are the following:

1. The plaintiff has no such interest in the note as entitled him to sue.

2. The note had been paid.

At Spring Term, 1873, of the Court below, the case was tried and two issues were submitted to the jury:

1. Has the plaintiff such an interest in the note as entitles him to sue?

2. Has the note been paid?

The jury found both issues for the plaintiff; that he had such interest as entitles him to sue, and that the note had not been paid.

The first issue was not put to the jury in the best form, because it involves a question of law which was not for them, but for the Court.

What interest the plaintiff had in the note was a question of fact for the jury; whether such interest entitled him to sue was a question of law for the Court. It turns out, however, that no injury resulted from it, because the facts were (421) stated by the plaintiff and not denied by the defendant; and his Honor charged the jury that if they believed the facts as stated by the plaintiff then he was entitled to sue. The facts as stated were that the note had been handed over to plaintiff without endorsement, by the payee, to collect and out of the money when collected to pay himself a debt which the payee owed him ($800) and the balance pay over to the payee.

We are of the opinion that his Honor was right in that charge.

Upon the second issue his Honor charged the jury that if they believed the evidence of the defendant Worrell they should find the note paid; but if they believed the evidence offered by the plaintiff they should find that it had not been paid.

We have frequently said that this is a very unsatisfactory way of putting a case to the jury, and that there are very few cases where it can be allowed, and none in which it can be necessary. In this case the jury might have believed every word of Worrell's testimony and yet not find the note paid, for he said only that "according to his recollection he had paid it." And on the other hand they might have believed every word of the testimony offered by the plaintiff, and yet have believed that the note had been paid to the original payee before the plaintiff got it. The proper charge would have been that they should consider all the evidence offered on both sides, and find the fact according to their convictions.

For this error there must be a new trial.

The foregoing are all of the exceptions to the Judge's charge. And upon these exceptions alone the case is now before us. It seems, however, that the case had been tried before at ...... Term, 1871, and an appeal had been taken from that trial to this Court; and at June Term, 1871, the case was remanded, and upon amended pleadings there was a second trial in the Court below, and from that trial an appeal was taken, and that is the trial which we are now reviewing. And it is clear that we are confined to a review of the last trial; yet the case shows that (422) after the verdict was rendered, and the appeal taken in the last trial, his Honor proceeded to find all the facts in the case (other than those involved in the issues submitted to the jury) which had not been found by a jury, and which had not been submitted to him in place of the jury, and proceeded to declare his opinion upon this assumed state of facts, and sends up the same to be reviewed by us. We know no warrant for this, and we mention it for the purpose of aiding the next trial. In looking into the pleadings and the evidence we see that the case is exceedingly complicated. And the issues which were submitted to and found by the jury do not cover the case, and will not enable the Court to decide it. Probably the parties will find their interest in agreeing to a reference under The Code, or in waiving a jury and allowing the Judge to find the facts.

But all that we can say is that there is error, and that there must be a *venire de novo*.

Per Curiam. *Venire de novo.*

Cited: Abrams v. Cureton, 74 N. C., 526; *Jackson v. Comrs.,* 76 N. C., 284; *Rhea v. Deaver,* 85 N. C., 340; *Wynne v. Heck,* 92 N. C., 416; *Egerton v. Carr,* 94 N. C., 653; *State v. Weathers,* 98 N. C., 687.

WYLIE, RODDIE & AMES v. J. Y. BRYCE.

When a defendant offers to pay a draft within fifteen days presented to him by an agent, who communicates the offer to the holder of the draft and is instructed by him to grant the indulgence, which instruction is told the defendant: *Held*, that the offer was a continuing one, and that his conditional acceptance bound the defendant as if it had been done when first presented.

Civil action, commenced in a Justice's Court and carried by appeal to the Superior Court of Mecklenburg, where it was tried at July (Special) Term, 1873, before *Moore, Judge.*

(423) Upon the trial the jury, under the charge of his Honor, returned a verdict in favor of the defendant. Judgment in accordance with the verdict and appealed by the plaintiffs.

All the facts in relation to the point decided in this Court are fully set out in the opinion delivered by *Justice Rodman.*

Jones & Johnston, for appellants.

Vance & Dowd, contra, submitted:

The alleged error was in the charge of his Honor that the promise of defendant to Williamson was not binding "unless it had been accepted there and then for the plaintiff," and they, the jury, need only consider the evidence of the alleged promise at Rock Hill, etc.

The original agreement with Jones was that defendant would pay a draft to plaintiffs for $150, if drawn on him by 1 November. As it was not drawn until 24 November, the acceptance was materially different from the proposition. Parsons on Contracts, p. 400, says, in regard to the *assent* which is necessary to make a contract complete: "The assent must comprehend the whole of the proposition, it must be exactly equal to its extent and provisions, *and it must not qualify them by any new matter.*" Now, as the draft was not drawn at the time proposed, the defendant was not bound by his proposition to pay it, and the reason given by him illustrates the soundness of the law.

The question is, then, was there an acceptance of or promise to pay to plaintiffs the draft of Jones to Williamson, the agent of plaintiffs? If there was, the charge was error; if not, it was correct. It must be borne in mind that the original proposition of defendant to honor a draft on 1 November not being complied with was out of the way altogether and Jones' draft was a *new proposition.* Its terms were to "pay on *demand.*" Bryce did not accept, but proposed to do so at the end of fifteen days. This was expressly declined by Williamson on the ground that he had no authority to to do so, but said he would write to his principal.

Now, if "an incomplete contract or agreement, which (424) one of the parties has the option of completing at a particular day" (see *Eskridge v. Glover,* 5 Stewart & Porter, 264), "raises a mutual right of rescission in the other party at any time before the ratification of the first," much more right would the defendant have in this case to rescind his proposition to pay in fifteen days which was not only not accepted then, but no time asked or fixed for considering it, but was just left at large. When Williamson returned, therefore, with authority to accept Bryce's proposal to pay in fifteen days Bryce had the right to decline, and his Honor was right in saying to the jury that the case turned on the alleged promise at Rock Hill. This was found against the plaintiff, and the case went off properly.

Again, if the promise or agreement with Jones was void because not complied with, and he had no funds of Jones in his hands when Williamson presented the draft, any promise he made to Williamson was void for want of consideration, and under section 8, chapter 59, Battle's Revisal.

RODMAN, J. This action was brought before a Justice of the Peace, and came to the Superior Court by appeal. No record of the pleadings before the justice is sent up. It was tried *de novo* in the Superior Court, without any pleadings being filed there, and we can only infer the matters in issue from the case on the appeal from that Court to this.

From this, and especially from the instructions of the Judge, it appears that the plaintiff claimed:

1. For a breach of the defendant's promise to pay the amount of Jones' draft on him if plaintiff would wait fifteen days, which promise was alleged to have been made to Williamson, an agent of the plaintiffs.

2. For breach of a promise to pay, alleged to have been afterwards made to plaintiffs personally at Rock Hill in South Carolina, which promise the jury negatived.

(425) We do not feel at liberty to consider any question except that made by the plaintiff's exception to the Judge's charge. The Judge assumed that there was evidence which would have made the offer of the defendant binding in case it had been immediately accepted. The case does not profess to set out all the evidence, and the only point discussed before us has been whether the omission by the agent *then and there* to accept the offer authorized the defendant to treat it as a nullity under the circumstances. This, therefore, is the only point to which our consideration has been directed.

The plaintiffs resided at Rock Hill, South Carolina. Having a draft drawn by Jones on defendant, they sent it to Williams as their agent to present it to defendant for payment at Charlotte. Williams, immediately on receiving the draft, presented it to defendant, who promised to pay it if Williams would wait fifteen days. Williams replied that he had no authority to do that, but would write to plaintiffs. He at once wrote to plaintiffs to that effect, and received a reply authorizing him to give the indulgence, of which he informed defendant, who said he would write to plaintiffs himself.

The Judge told the jury, in effect, that the promise of Williams was not binding, as it was not accepted for the plaintiffs *then and there.*

In this we think his Honor erred.

A collection and able discussion of the principal cases upon the making of contracts by correspondence, or by messengers, which are the same thing, may be found in the second edition of Benjamin on Sales, 38, 51.

The cases most worthy of attention are *Adams v. Linsdell,* 1 B. & Ald., 681; *Dunlop v. Higgins,* 1 H. of L. Cas., 381; *Mactier v. Frith,* 6 Wend. (N. Y.), 104; *Tayloe v. Merchants Fire Insurance Company,* 9 How., 390.

The law, as applicable to the facts of the present case, is this: When the defendant, on being presented by the agent of the plaintiffs with the draft from Jones, offered to pay it if the plaintiffs would wait fifteen days, the offer was a continuing one for such reasonable time as (426) would enable the agent to communicate it to his principal and receive his reply.

This reply was an acceptance of the offer which was made and sent to the agent in a reasonable time, and communicated by him to the defendant. We think that after the acceptance of the offer by the plaintiff the bargain was closed and that defendant could not retract; or, at all events, this was so after the acceptance was made known to the defendant. At which of these dates it became closed is not material in the present case.

PER CURIAM. *Venire de novo.*

COMMISSIONERS OF CATAWBA COUNTY v. GEORGE SETZER.

1. When a matter is voluntarily settled by the act of the parties, in the absence of fraud or mistake, it must be deemed settled forever.
2. *Therefore,* where the County Court of a county, in the year 1862, appointed an agent to borrow money and purchase salt for the families of soldiers then in the Confederate army, and in 1867 ordered the agent to pay to the person from whom the money was borrowed a certain sum, which was done, the board of commissioners of such county cannot recover back the money so paid by the agent.

CIVIL ACTION, tried at Spring Term, 1873, Superior Court of CATAWBA, before *Mitchell, Judge.*

Plaintiff, the Board of Commissioners of Catawba County, seeks to recover from the defendant the sum of five hundred dollars, heretofore wrongfully paid to him by Jonas Cline, sheriff of the county.

The facts are:

In 1862, Jonas Cline, at a called Court of the Justices of Catawba County, a majority being present, was appointed an agent to buy salt for the county, and to enable (427) him to do this he was authorized to borrow the sum of $5,000. Pursuant to this order he borrowed of defendant $4,200, purchased salt with it, which he distributed to the citizens of the county, giving no preference to the families of those in the army, but selling the salt at prime cost to every one who needed it.

In 1867 the County Court ordered the County Treasurer to pay the amount owing to the defendant, and in 1868 the sum of five hundred dollars was paid to him on his claim. For this money so paid illegally, as the plaintiff alleges in his complaint, this suit is brought.

His Honor being of opinion that the plaintiff could not recover so instructed the jury, who found a verdict for defendant. Judgment accordingly, and appeal by the plaintiff.

Schenck, with whom was *Bailey & McCorkle,* argued:

That the contract was illegal and void and could not be ratified or confirmed so as to bind the county by common law, by ordinance and by the Constitution. *Leak v. Comrs.,* 64 N. C., 140; *Comrs. v. Setzer, Ib.,* 516; Ordinance of 15 October, 1865; Constitution, Art. 7, sec. 13; *Weith v.*

Wilmington, 68 N. C., 33; Story on Agency, secs. 126, 240, 241; 1 Parsons on Contracts, pp. 457-8.

The justices and sheriffs are public agents, and cannot bind the government except where these powers are manifest, and persons dealing with them must do so with caution or be held responsible for receiving public money. Story on Agency, secs. 307 and 307a; secs. 223-4, 240-1.

They are not protected by any mistake in law or fact of the agent; *Ib.,* sec. 307. Paley on Agency, p. 144 (337 marg.).

M. L. McCorkle, contra, cited and relied upon Dillon on Corp., 10, 33; *Capehart v. Moon,* 50 N. C., 178; *Houston v. Clay County,* 18 Ind., 396; Chitty Contracts, 193; 3 N. C., Hay., 2311; Story Agency, 307; *Mitchell v. Walker,* 30 N. C., 243; *Newall v. March, Ibid.,* 441; *Twitt v. Chaplain,* 11 N. C., 178; *Mayo v. Garner,* 49 (428) N. C., 359; *Newland v. Buncombe Turnpike Co.,* 26 N. C., 372; *Pool v. Allen,* 29 N. C., 120.

RODMAN, J. In a case between individuals the law is too well settled to admit of dispute. It is said in Chitty on Contracts, 636: "If an illegal contract be executed or performed, and both parties are *in pari delicto,* no action lies to recover back money paid"; and in *Howson v. Hancock,* 8 Term, 575, *Lord Kenyon, C. J.,* says: "But there is no case to be found where, when money has been actually paid by one of the parties to the other, upon an illegal contract, both being *particeps criminis,* an action has been maintained to recover it back again." See also, *Pearson v. Lord,* 6 Mass., 81, and *Worcester v. Eaton,* 11 Mass., 368.

It is attempted to exclude the present case from the general rule on the ground that the plaintiff is a municipal corporation, and is not bound by the illegal acts of its agents; and that at the time of the payment it was not known that payment could not be enforced.

It may be that if an agent of the plaintiff had exceeded his authority and paid the defendant, the corporation might repudiate the act, and recover the money. But that is not the case. The payment was made by the authority of the corporation. No authority has been cited to show that in such a case a municipal corporation stands on any different ground from an individual in a like case. We know of no reason why it should. The rule is not founded on anything in respect to which a municipal corporation differs from an individual but on the maxim of common sense and convenience, "*in pari delicto, potior est conditio possidentis.*" There must be an end to litigation. When a matter is voluntarily settled by the acts of the parties in the absence of fraud or mistake, it must be deemed settled forever. Could a county recover of the individual soldiers of the Confederate (429) army for the clothes and provisions, which, in many instances, they furnished them or their families? Or could the State now recover from its officers the salaries which it paid them during the war?

We do not mean that those instances are not distinguishable from the present. They are stated merely as extremes to which the doctrine contended for by the plaintiff might be, not illogically, carried.

Neither can the Ordinance of 1866 and the Constitution of 1868, which forbid such payments, help the plaintiff after, notwithstanding them, he has made the payment. Before the statutes and by common law it was a breach of duty in the sheriff to pay the money of its constituents where there was no legal or moral obligation to pay it. The effect of these statutes has been considered elsewhere; they do not affect the present case.

Neither can it help the plaintiff that at the time of the payment it was not known that the contract was illegal, and could not be enforced. The facts which made it illegal were all known. In such a case the plaintiff must be taken to have known the law.

PER CURIAM. Judgment affirmed.

BYNUM, J., did not sit.

Cited: Lusk v. Patton, post, 703; *Comrs. v. Comrs.,* 75 N. C., 242; *Dickerson v. B. & L. Asso.,* 89 N. C., 39; *Brummitt v. McGuire,* 107 N. C., 357; *Bank v. Taylor,* 122 N. C., 571.

(430)

F. E. WINSLOW v. ALFRED WOOD.

1. Mere inadequacy of consideration, without fraud or imposition, is no defense to a suit on a bond, nor is it an objection, even when equity is invoked to enforce specific performance, and much less is it an objection when it is invoked to relieve against a contract.
2. Where A sold a mule to B which had a latent disease, of which it died within a week after sale without rendering any service of value: *Held*, in a suit against B on the bond given for the mule, that the failure of consideration was no defense, and that A was entitled to recover.

CIVIL ACTION, commenced in a Justice's Court, and by appeal carried to the Superior Court of CHOWAN, where it was tried before *Albertson, Judge,* at Fall Term, 1873.

In 1872 one Rogerson, an agent of the plaintiff, sold to the defendant a mule, and in payment for the price took defendant's note under seal for $173, payable in November, 1872.

Defendant showed that the mule was a young one, apparently in fine condition when received; that it was sent to his farm five miles from town and the day after was put to some light work; that the mule seemed dull and indisposed to work, and after two or three hours was taken out. On the next day it was driven a few miles, with another one, and on another occasion, two days afterwards, the mule was driven with others in a wagon to town, and hauled back a load of guano. This was the only work performed by the animal, as he showed symptoms of sickness on each occasion of his being worked, and died a week from the time he was purchased. The services rendered by the mule did not pay for his feed and attendance.

It was also in evidence that at the time of the purchase, or immediately thereafter, a small knot was discovered under his throat; that in a few days his breast was much swollen and the flesh in a doughy condition, readily yielding to compression and retaining the impression received; that there was a discharge from the nose, and his hind leg (431) became swollen and burst open, followed by suppuration; his respiration was difficult, though the appetite good to the time of his death.

An expert was examined, who testified that the symptoms testified to indicated glanders or farcy, and the breaking down of the tissues, shown by the condition of the flesh as proved, was an invariable symptom of one or the other disease. That a young animal might have either disease, be apparently well and in fine condition, and have a morbid appetite, which would continue until his death.

For the plaintiff, it was shown that a number of mules from the same drove had been sold, and none had died from either disease; and that at the time of the sale of this one to the defendant he was apparently well and in fine condition.

There was no evidence of warranty.

Defendant insisted that the plaintiff could not recover on account of the entire failure of consideration; to which his Honor replied, in the presence of the jury, "I don't think there has been any failure of consideration."

His Honor charged the jury that if there was no warranty by the plaintiff, nor any knowledge on his part, at the time of sale, of unsoundness in the animal, he was entitled to recover the full amount of the note; that the doctrine of recoupment or counter claim could not apply to this case.

Verdict in favor of plaintiff for $175 and interest. Judgment, and appeal by defendant.

A. M. Moore, for appellant.

No counsel in this Court for plaintiff.

READE, J. The plaintiff sold to the defendants a mule and took their bond for the price. The mule had (434) a latent disease of which it died in a few days without having rendered any service of value. There was no *warranty* and no *scienter* on the part of the plaintiff. The action is upon the bond.

The question is whether there is such a failure of consideration as to render the contract void and prevent a recovery on the bond?

At law a bond is good without a consideration. It is bad, not when there is *no* consideration, but only when there is an *illegal* consideration. At law, therefore, the defendant would have no defense. But we now administer law and equity both in the same action, so that we have to consider whether there is any defense in equity.

The rule is not that equity will *relieve against* or declare void a contract because there is no consideration; but the rule is that it will not *enforce the performance* of a contract without a consideration. And even then it does not require an *adequate* or full but only a *valuable* consideration unless the value is so inadequate as to prove fraud or imposition. Adams Eq., 79.

In our case fraud and imposition are negatived.

The class of cases where equity relieves against a contract for want of consideration is where the parties supposed there was a consideration and it turns out that they were mistaken, and that the supposed consideration was non-existent. The case put by Mr. Adams is, "where the subject of sale is a remainder after an estate tail; and the estate tail without the knowledge of either party had been previously barred." Adams Eq., 188. And so in our case, if the mule had been dead at the time of sale without the knowledge of either party. But such was not the fact. There was no mistake about it. The mule was present, and was just what it appeared to be, a mule. And although it was not intrinsically as valuable as it was supposed to be, yet it was of some value, a market value to the full amount of the bond. And we have seen that mere inadequacy of consideration without fraud or imposition will be no objection even where equity is invoked to enforce specific performance, much less where it is invoked to relieve against a contract. So, counterfeit money as a payment, or as a consideration, will (435) be treated as a nullity; but the bills of an insolvent bank used without fraud as a payment or as a consideration will be treated as a valuable although an inadequate consideration. So a bag of sand sold in fraud or by mistake for a bag of guano would be a total failure of consideration, and the contract would be null; but a bag of inferior guano would only be a partial failure of consideration, and would support the contract so as to enable the vendor to recover. And whether the vendee would have a counter claim against the vendor, would depend upon circumstances; as, whether there was warranty or deceit. C. C. P., sec. 101.

There is no error. Judgment affirmed and entered here for plaintiff.

PER CURIAM. Judgment affirmed.

Cited: Morris v. Willard, 84 N. C., 295.

JOHNSON JOHNSON and MARGARET SINCLAIR v. DUNCAN M. KENNEDAY.

Until his fees are paid or tendered, a sheriff is not bound to execute process.

(*Jones v. Gupton,* 65 N. C., 48, cited and approved).

MOTION for a rule to amerce the Sheriff of RICHMOND County, heard before *Buxton, Judge,* at Fall Term, 1873, of the Superior Court.

On 25 August, 1873, a summons was placed in the hands of the sheriff, who returned it on the 25th of the ensuing October, endorsed "Not executed for the want of fees." Plaintiffs contending this to be an insufficient return moved for a rule against the sheriff, which motion the Court refused, upon the ground that the sheriff was entitled to his fees in advance. From this judgment plaintiffs appealed.

(436) No counsel in this Court for the appellants.
Neill McKay, contra.

SETTLE, J. This was a motion for a rule to amerce a sheriff for an insufficient return upon a summons.

The sheriff returns, as his excuse for not executing the summons, that his fees had not been paid.

In *Jones v. Gupton,* 65 N. C., 48, it is held that a sheriff, since the adoption of the C. C. P., secs. 75 and 555, is not required to execute process until his fees are paid or tendered by the person at whose instance the service is to be rendered.

But as the Act of 1870-'71, chap. 139, repeals the whole of Title XXI of the C. C. P., in which the 555th section is included, we presume that the plaintiff supposed that all provisions of law requiring the pre-payment of fees were repealed.

In this he was mistaken, for while the Act of 1870-'71 repeals that portion of section 75 of the C. C. P. which gives mileage to a sheriff for the distance traveled in executing a summons, it leaves all other provisions of that section in full force; and one of the provisions is that the sheriff shall be entitled to his fees before executing a summons.

We find that this provision is brought forward and reënacted in Battle's Revisal, chap. 17, sec. 75.

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

JOHN MURPHY v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

Plaintiff, going to defendant's warehouse after goods, stops his wagon on a track nearest the platform and next to the main track, over which the mail train passes, so near thereto as to be in the way of the engine: *Held*, in a suit to recover damages for the destruction of his wagon by the engine, that his loss is the result of his own negligence, and that he had no right to recover.

CIVIL ACTION (for the recovery of damages), tried before *Russell, Judge,* Spring Term, 1873, Superior Court of GREENE County.

The plaintiff brings this action against the defendant to recover damages for the destruction of his wagon under the following circumstances:

Plaintiff had his wagon at the warehouse of defendant in Goldsboro to receive freight. The warehouse is three hundred feet long, having a platform on each side its entire length; the track on which the cars stand for the receipt and delivery of freight is near to and parallel with the platform. The warehouse has a number of doors on each side, and there are several tracks on each side parallel with each other, used for loading and unloading defendant's cars.

The plaintiff drove his wagon alongside of a flat car which was on the track nearest the platform of the east side of the warehouse; that the second track from the warehouse on that side, being that next to the one on which the flat car stood, is what is called the main track, or that over which the mail and passenger trains pass. Plaintiff thought there was sufficient room between his wagon and the passenger track for trains passing over the latter to clear his wagon, which was from six to twelve inches from the latter track; he, the plaintiff, knew that trains were frequently running over the track and he took his horse from the wagon, fearing that he might become frightened and run. While the wagon was on the track nearest the platform the mail train (438) came up from the south, the engineer's position being on the right side of the cab; the engineer saw the wagon, changed his place in order to "sight the track," and doubting whether the engine would clear the wagon immediately blew his whistle for applying the brakes and stopped his train as soon as he could, and just as it came in contact with plaintiff's wagon. The engineer thinks that six inches more space would have cleared it.

The defendant does not deliver freight at any specially designated place about the warehouse, but consignees come in, pay freight and receive their goods from any place they select. Draymen about town were in the habit of taking their drays to this side of the warehouse, taking their loads from the platform, or, when flat cars were standing on the track nearest the platform, of receiving their goods over the flat cars, and when a train passed along over the passenger or main track such draymen would drive off, returning as soon as the train passed.

The plaintiff placed his wagon in this place because it was the nearest point to his goods, and because he would have to have carried them a great distance had he stopped at either end of the flat cars; the agent of defendant, keeper of warehouse, saw plaintiff when he drove up, saw him leave his wagon, and saw it after he had unhitched his horse and before the train came up. The train had stopped at the passenger depot, about four hundred yards south of the warehouse, and that signals were duly given on starting the train, which could be heard by any person about the warehouse; and that the train itself could be easily seen by any one engaged about there.

The engineer stated that he could have stopped the train sooner than he did if the coaches had been supplied with other kind of brakes; that the brakes then on the coaches were those universally used in this region, but there are brakes of greater power to stop trains than these.

There was a verdict for the plaintiff, subject to the opinion of his Honor on the facts as stated; and he being of opinion that the plaintiff was not entitled to recover, gave judgment against him for the costs. From which judgment plaintiff appealed. (439)

J. H. Haughton, for appellant.
Moore & Gatling, contra.

SETTLE, J. The plaintiff alleges that he has been endamaged by the negligence of the defendant. We think that his losses are the result of his own carelessness, and if any one has a right to complain it is the defendant.

The plaintiff inspected the ground and placed his wagon so near the main tract of the defendant's road as to prevent the train from passing without striking the wagon, and his excuse for doing so is that "he thought there was room for trains to pass without striking his wagon." Why then blame the company if its agent, the engineer, thought the same thing?

But it seems that the engineer formed a more correct idea of the space at a distance than the plaintiff did upon the spot, and immediately blew his whistle for the application of the brakes and stopped his train as soon as he could. The brakes were such "as are generally and universally used in this region of country."

The case discloses no negligence on the part of the defendant, but great want of care on the part of the plaintiff.

It is more appropriate to say that the plaintiff has been the real and only cause of the mischief than to say that he has contributed to it. He may congratulate himself that there is no complaint before the courts of injury to the property of defendant, or to the persons of those traveling upon its road.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Manly v. R. R., 74 N. C., 655.

(440)

JOSEPH W. JENKINS & CO. v. JAMES H. BEAL.

1. Where a debtor owes several debts to a creditor and makes payments, he may appropriate such payments to any of the debts he pleases. If, however, he fails to do so at the time, the creditor may appropriate them as he pleases at any time before suit brought.

2. *Therefore,* where such debts are partly secured by a mortgage of personal property for an amount insufficient to pay all the debts, and the debtor makes no application of his payments as they are made, the creditor is at liberty to appropriate such payments to such part of the debts as is unsecured, and to hold the property mortgaged liable for the unpaid balance.

(*Moss v. Adams,* 39 N. C., 42, cited and approved).

CIVIL ACTION (to recover possession of certain personal property heretofore mortgaged), tried at December (Special) Term, 1873, HALIFAX Superior Court, before *Moore, Judge.*

The defendant, in January and May, 1870, executed to the plaintiffs two several mortgages (or liens on his crops) conveying his crops to be made during that year and certain stock to the plaintiffs to secure advances by them to be made to an amount of $1,000, or $500 each.

It was admitted that the plaintiffs had furnished to the defendant money and supplies to an amount of over $2,000, being $1,000 in excess of the sum secured; it was also admitted that plaintiffs had given defendant credit for all sums of money and proceeds of the crop, which he had sent them, except two bales of cotton, the proceeds of which they, the plaintiffs, contended should be applied to the credit of an account which the firm of Beal & Dicken owed them, as the cotton was the property of said Beal & Dicken. As to this, an issue was made and submitted to the jury, who found the facts in favor of the plaintiffs.

It was further admitted that the defendant had sent to plaintiffs money and produce raised on his farm and (441) embraced in said mortgages sufficient to pay off the sum of $1,000, secured in said mortgages; and the defendant insisted that the money thus sent to the plaintiffs by him, and the produce from the farm sent them to be sold should be applied first to the satisfaction and discharge of said mortgages and the balance, if any, should be applied to the balance of the plaintiff's account against him.

The plaintiffs contended that the sums received by them, as above stated, should be first applied to the satisfaction of what defendant owed them for articles furnished over and above the sum secured in the two mortgages, and any excess after paying the sum thus unsecured should be applied to the extinguishment of the mortgages.

The plaintiffs had kept a general running account with the defendant, charging him with articles, money, etc., furnished him, making no difference or distinction by which any part of the account could be distinguished as that secured by the mortgage, from any other part not so secured, and had given the defendant credit on the general account with all sums for which he was entitled to credit. There was no evidence to show any application, by either the plaintiffs or defendant, of the credits to the payment of any particular part of the accounts as distinguished from any other part of the account as secured or unsecured.

Upon the foregoing state of facts the Court held that the credit must be first applied to the payment and satisfaction of the sums secured in the two mortgages, and the mortgages being in this way satisfied the Court gave judgment in favor of the plaintiffs for the balance due on account, refusing a judgment in their favor for the recovery of the property conveyed in the mortgage.

From this judgment, plaintiffs appealed.

Batchelor, Edwards & Batchelor, for appellants.
Conigland, contra.

RODMAN, J. On 18 January, 1870, defendant executed to plaintiffs a deed, which after reciting that plaintiffs had agreed to furnish him with money and supplies to enable him to cultivate a certain piece of land during the year 1870, to an amount not to exceed $500, in order to secure the payment of such advances on 1 December next, conveyed to plaintiffs defendant's crop to be raised on said land and certain stock, etc., to be void if such advances should be paid, etc., and agreed to consign to plaintiffs his crop or else to pay plaintiffs 2½ per cent. commission, etc. The plaintiffs (442) accordingly advanced to defendant to a value much exceeding $500 between 5 February, 1870, and 30 December, 1870. On 30 June, 1870, the advances amount to $1,216.91, and the first payment was made in September, 1870. On 1 December, 1870, the balance in favor of plaintiffs was $1,530.62, the defendant having paid to that date $234.63. Afterwards further advances and also further payments were made, so that on 1 January, 1871, according to plaintiff's account, there was a balance due them of $1,093.88, although the payments since 1 December, 1870, had exceeded $500.

The plaintiffs brought their action to recover the mortgaged property. The defense was that the mortgage debt had been paid. The Judge so held and gave the plaintiffs a judgment, not for the property which they demanded but for a certain sum of money, and plaintiffs appealed.

The only question presented to us is this: The defendant having failed to make any appropriation of the several payments made by him, were the plaintiffs at liberty to apply them to the excess advanced over the sum secured by the mortgage, or were they bound to apply them to the mortgage debt?

This question is fully answered by the learned opinion of *Ruffin, C. J.*, in *Moses v. Adams,* 39 N. C., 42. This opinion is so well supported by reason and authority that it would be superfluous to attempt to add to it. Those who choose to search for later cases will find them referred to in (443) the notes to Clayton's case. 1 Tudor's Lead. Cas., Mer. Law, 1.

The rule is that where a debtor owes several debts to a creditor and makes payments, he may appropriate the payments to any of the debts he may please; but if he fails to do so at the time, the creditor may appropriate them as he pleases (subject to some exceptions not material here) at any time before he brings suit for the balance. Here there was no appropriation by the debtor, and the creditor appropriated the payments as he lawfully might to so much of the debt as was not secured by the mortgage debt unpaid and existing.

His Honor, the Judge below, therefore erred in holding the mortgage satisfied. The plaintiffs were entitled, by virtue of their *legal* title, to recover the property sued for. But the Superior Court is a Court of Equity, as well as of law. Upon such recovery the question would immediately arise whether the plaintiffs were entitled to hold the mortgaged property as a security only for the sum of $500 secured by the mortgage, or for the payment of the larger sum due them if the mortgaged property shall turn out to be worth more. That question amounts to this: Whether one who has mortgaged property for $500, and who afterwards becomes indebted to the mortgagee in a sum beyond the mortgage debt, can redeem by paying simply the mortgage debt, or only on paying the whole that he owes. In this State we have not recognized the doctrine of tacking, as defined in the English law. That doctrine is stated thus: Where there are three successive mortgages on the same property, the first mortgagee of course has the legal estate, and if the third mortgagee shall obtain an assignment from the first, the second mortgagee cannot have the property without paying off both the first and third mortgages. But it will be perceived that that case differs materially from the present, as here the question is between the mortgagee and the mortgagor, and the rights of no third persons have attached. The question is of general importance, but as it is not presented to us now, and (444) may not be, we express no opinion on it.

PER CURIAM. Judgment reversed, and case remanded to be proceeded in, etc.

Cited: Sprinkle v. Martin, 72 N. C., 93; *Jenkins v. Smith, Id.,* 306; *Hawkins v. Long,* 74 N. C., 783; *Vick v. Smith,* 83 N. C., 82; *Lester v. Houston,* 101 N. C., 608; *Wallace v. Grizzard,* 114 N. C., 495; *Burnett v. Sledge,* 129 N. C., 120.

J. G. WITHERINGTON v. R. L. PHILLIPS.

A receipt for a certain sum in payment of a lost or mislaid note discharges only so much of said note as such receipt amounts to.

(*McKenzie v. Culbreth*, 66 N. C., 534, cited and approved).

Civil action, for the recovery of a note commenced in a Justice's Court and carried by appeal to *Clarke, Judge,* at chambers in Greene.

The note sued on was for \$12.87½, payable within six months after 24 March, 1857. The defendant relied upon the following receipt:

"Received of R. S. Phillips, twelve dollars and fifty cents in payment of one note which was given to me as administrator of Barham Heart, deceased, by Joseph Turnage, principal, and R. S. Phillips, surety, which note is lost or mislaid."

His Honor held that the receipt extinguished the note, and gave judgment against the plaintiff for the costs; from which judgment the plaintiff appealed.

Gray, for appellant.
No counsel *contra* in this Court.

Rodman, J. The case of *McKenzie v. Culbreth,* 66 N. C., 534, settles that the payment, evidenced by the receipt (445) of 1 November, 1865, being for an appreciable sum less than the amount due on the note, did not discharge the note in full, but was only a payment *pro tanto.* The payment is not even stated to be in full in the receipt. The Judge erred therefore in holding it a discharge in full. Judgment reversed, and plaintiff will recover in this Court the residue of the note after deducting the payment. It is certainly to be regretted that so much costs should have been incurred for a pitiful claim of about thirty cents.

Per Curiam. Judgment reversed.

W. G. ALBRIGHT, executor, and others v. ALSA MITCHELL.

When issues are made up by the pleadings, parties have the right to have those material to the determination of the case submitted to a jury, and for the presiding Judge to withdraw such material issues and substitute others is error.

CIVIL ACTION, for the specific performance of a contract for the purchase of land, tried by *Tourgee, Judge,* at Fall Term, 1873, of CHATHAM Superior Court.

The facts of the case are fully set out in the opinion of the Court.

From the judgment of his Honor, overruling certain exceptions of the defendant to the admission of evidence, he appealed.

Headen and *Batchelor* and *Edwards & Batchelor* for appellant.

Smith & Strong and *Parker, contra.*

BYNUM, J. This was an action for the specific performance of a contract for the purchase of a tract of land. The defendant, in his answer, admits the contract and giving the note for the purchase-money, but alleges that he has paid off the debt in sundry payments therein set forth, (446) and he demands the surrender of the note and the execution and delivery of a deed for the land.

Upon the pleadings the following issue was made up and submitted to the jury: "Is there anything due from the defendant upon the two bonds given for the purchase-money of the land mentioned in the complaint, and if so, how much?"

Much evidence was introduced on both sides and several exceptions were made by the defendant to the evidence and the rulings of the Court. which we will not now examine, as we put our decision upon another point in the case.

After the testimony was closed, his Honor, against the wishes of the defendant, withdrew the issue, and in the place thereof submitted four others, to-wit:

1. "Is the defendant entitled to any credit on his bonds for staves got out on the Bell land, and if so, how much?"

2. "Is defendant entitled to any credit on his bonds for removing said staves, and if so, in what amount?"

3. "Is defendant entitled to any further credit on his bonds by reason of a horse sold to Trollinger, and if so, in what amount?"

4. "Is defendant entitled to any credit on his bonds for getting out any other staves than those got out on the Bell land?"

The issues are made by the pleadings, and parties have the right to have all so made and which are material to the determination of the case submitted to the jury. It is true that if the Court deems any particular fact or matter a material subject of special enquiry and finding he has the right to submit an issue for that purpose, but he has not the right to withdraw from the jury the more comprehensive issue or issues which involve the merits of the whole case, and submit in the stead narrower and more restricted issues which do not go to the entire merits.

While, therefore, the substituted issues are not objectionable, it was not proper to deprive the defendant and the jury of the advantage of considering any evidence (and (447) there certainly was some) as to other payments besides those named in the four new issues. The first issue submitted was the proper one, and the true enquiry was, "Had the notes been paid, and if not, what was due upon them," and we can readily perceive how the defendant was prejudiced by withdrawing it from the jury.

One of the defendant's exceptions raises a question of practice under the new law of evidence. On the trial the witnesses were sent out of Court, in charge of an officer, the defendant remaining in Court, on the assurance that he would not be examined as a witness. He was, however, introduced to contradict another witness, and, by consent of the plaintiff, allowed to do so, to a prescribed extent, but was then stopped by the plaintiff and the Court from giving the whole of the conversation he was deposing to. It would seem that a party in interest to an action has the right to be present at the trial and has the right to testify in his own behalf, and it would follow that he can withdraw any voluntary consent not to testify, or to withdraw with the other witnesses.

This case is a proper one for reference.

There was error.

PER CURIAM. *Venire de novo.*

Cited: Cedar Falls v. Wallace, 83 N. C., 227; *Best v. Frederick,* 84 N. C., 179; *Grant v. Bell,* 87 N. C., 42; *Cuthbertson v. Ins. C.,* 96 N. C., 484; *Phifer v. Alexander,* 97 N. C., 337; *Cecil v. Henderson,* 121 N. C., 246.

WILLIAM JONES, executor, etc., v. THOMAS WOODS.

The right of action accruing upon the following instrument—"This is to show that half the hire of Randall, hired to Larkin Brooks, is Moses Jones', 29 December, 1853"—did not arise until a demand and refusal, at which time the statute of limitations began to run.

CIVIL ACTION, commenced before a Justice of the Peace 7 October, 1872, and tried before *Tourgee, Judge,* and a jury of the Superior Court of PERSON.

The plaintiff alleged that the defendant, as agent (448) of his testator, Moses Jones, had received $50 and had appropriated the same to his own (the defendant's) use. This the defendant in his answer denied, and insisted that any claim the plaintiff might have was barred by the statute of limitations.

Upon the trial it was found for the plaintiff that the defendant had hired a certain slave named Randall to one Brooks for the year 1853, taking bond for the said hire in the sum of $100; that on 15 November, 1853, Randall being in the possession of Brooks, the defendant sold him to the plaintiff's testator; and on 29 December, following, the defendant signed and delivered to said testator a paper writing of the following tenor, to-wit:

"This is to show that half the hire of Randall hired to Larkin Brooks, is Moses Jones'.

"29 December, 1853. THOS. WOODS."

Moses Jones, the testator of the plaintiff, died in 1854, and the plaintiff qualified in the same year.

It was further in evidence that all the money due on account of the hire of Randall for the year 1853 was paid to the defendant after the death of the testator; that the plaintiff did not find the note sued on (the one above set forth) until some time in the summer of 1866; and that soon thereafter he demanded payment of defendant, which payment was refused. There was evidence tending to show that the defendant had paid the money sued for to the said testator of the plaintiff.

His Honor instructed the jury that if, from the evidence they believed the defendant had not paid the money sued for to the plaintiff's testator, they would find for the plaintiff; otherwise, they would return a verdict for defendant. That the statute of limitations did not bar the action. To this charge the defendant excepted.

The jury returned a verdict in favor of the plaintiff (449) for $50, with interest from 1 July, 1866. Judgment in accordance therewith, and appeal by defendant

Batchelor, Edwards & Batchelor, for appellant.
Jones & Jones, contra.

PEARSON, C. J: The case turns upon the statute of limitations, and its application depends upon the construction of the instrument signed by the defendant in these words:

"This is to show that half the hire of Randall, hired to Larkin Brooks, is Moses Jones'. THOS. WOODS."
"29 December, 1853."

The defendant received the amount due for the hire of Randall for the year 1853, after the death of Moses Jones—but the case does not set out what time—so that point is not presented and the point made is this: Did the cause of action accrue at the end of the year 1853, for which year the slave Randall was hired, or did it not accrue until the demand in July, 1866? If the former be the construction, the action is barred by the statute of limitations; if the latter be the construction, then the action is not barred by the statute. We concur with his Honor in the opinion that the cause of action did not accrue until the demand.

It is not the understanding that Woods should become a *debtor* of Jones for $50 to be paid at the end of the year so as to impose on him the duty of seeking his creditor and tendering the money, for if that had been the understanding he would have given his promissory note.

As we construe the instrument, it is evidence of an agreement that Jones, who bought the slave before the time for which he had been hired had expired, should be entitled to one-half of the hire, that is one-half of the sum for which he was hired for the year 1853.

This did not make Wood a *debtor* of Jones for $50. (450) Suppose Larkin Brooks had failed, and the hire for 1853 could not by reasonable diligence have been collected, Wood was under no obligation to pay one-half of the stipulated sum for the hire of the slave, and he was under no obligation after the hire was paid to seek Jones and tender the amount.

Our conclusion is that the cause of action did not accrue until a demand and refusal.

No error.

PER CURIAM. Judgment affirmed.

SARAH H. DULA and another v. ZEPHANIAH YOUNG and C. W. CLARK, administrators, etc.

1. It is prejudicial to the rights of the plaintiffs for the presiding Judge on the trial below to charge the jury that "the plaintiffs are not entitled to recover in any event, and if the issues were found in their favor he would set aside the verdict," and afterwards to submit the issues to be passed upon by the jury to "say how the matter was."
2. Where there was an agreement between a husband and wife that if the wife would join him in a conveyance of a certain tract of land descended to the wife from her father she should have another tract in lieu of the one so conveyed: *Held,* that when the husband received the money for the land conveyed, as before set out, he held it upon trust for his wife, and that his estate became responsible therefor.
3. *Held further,* that the heirs at law of the wife are entitled to the land agreed to be substituted for that of the wife, free from the incumbrance of the husband's debts.

(*Smith v. Smith,* 60 N. C., 581, cited and distinguished from this).

CIVIL ACTION, to recover a tract of land, tried at Fall Term, 1873, of WILKES Superior Court, before *Mitchell, Judge,* and a jury.

The plaintiffs, children and heirs at law of John (451) Witherspoon, the intestate of the defendant Clark and his wife, Elizabeth, allege that in 1842 their ancestor, John, was seized, in right of his wife of a tract of land known as the "Calloway tract," which he sold, and in order to obtain the consent of his wife to the sale agreed if she would sign the deed conveying the Calloway tract that he would purchase for her the Elk Farm tract, which should be substituted for the other, which had descended to her from her father. John Witherspoon took the deed in his own name, not mentioning or in any manner attending to the agreement with his wife, which was not reduced to writing. Upon his death his administrator, the defendant Clarke, sold the Elk Farm tract with his other real estate to pay debts, and Young, the other defendant in this action, became the purchaser. The plaintiffs demand that this agreement between their father and mother should be set up, and that the Elk Farm tract should be declared to be their property, as heirs of their mother, and not subject to the payment of their father's debts.

The defendants deny the material allegations of the plaintiffs' complaint, and rely upon the statute of frauds to prevent their recovery.

On the trial the following issues were submitted to the jury:

1. "Did John Witherspoon enter into an agreement with his wife, Elizabeth, that if she would convey the Calloway tract of land, and join him in a deed therefor to Prudence Calloway, the heir at law of William Howard, that she should have the Elk Farm tract (the same sought to be recovered in this action), as a substitute and in lieu thereof, as her own land?"

2. "If such agreement was made, was there any note or memorandum in writing of the same signed by the party to be charged therewith?"

3. "Was the consideration paid for the Calloway land to John Witherspoon, and used by him in the payment of the Elk Farm tract?"

There was evidence tending to prove that the contract of the sale of the Calloway land by John Witherspoon and his purchase of the Elk Farm land was at the (452) same time. The dates of the deeds were as follows: The deed of the Elk Farm land is dated in February, 1841; the deed given by himself and wife for the Calloway tract is dated in 1848, a suit concerning the latter pending between those dates.

It was conceded by plaintiffs that there was no evidence of any contract in writing, and the jury might find that issue for defendants.

After the evidence had been submitted and the argument closed, the Court informed the jury that the plaintiffs were not entitled to recover in any event; and if the issues were found for the plaintiffs he would set aside the verdict. Afterwards his Honor said to the jury that they could take the issues and pass upon them, and say how the matter was. Thereupon the jury returned a verdict finding the first issue in favor of the plaintiffs and the second and third in favor of the defendants.

The plaintiffs then asked for a new trial on the third issue, because the Court had intimated how the jury should find the first, which motion was refused. The plaintiffs then requested that the Court would declare the rights of the plaintiffs on the facts admitted and the finding of the jury. The Court refused, intimating that the plaintiffs were entitled to no relief of any sort. Plaintiffs appealed.

Caldwell and *Smith & Strong,* for appellants.
Folk and *Armfield, Collins* and *McCorkle, contra.*

SETTLE, J. We do not think that the plaintiffs have had fair measure. After the evidence had all been submitted and argued to the jury, the Court told the jury "that the plaintiffs were not entitled to recover in any event, and if the issues were found for the plaintiffs he would set aside the verdict." Afterwards the Court said, "the jury can take the issues and pass upon them and say how the matter was."

This manner of submitting the issues was calcu-
(453) lated to throw the jury off their guard and to prejudice the rights of the plaintiffs.

Why consider the evidence with that care and attention which properly belongs to all jury trials, if their findings are to have no weight with the Court but are to be set aside in any event?

But even under this unfavorable charge the jury have found "that John Witherspoon did enter into an agreement with his wife Elizabeth that if she would convey the Calloway tract of land and join him in a deed therefor to Prudence Calloway, the heir at law of William Howard, that she should have the Elk Farm tract (the same now in suit) as a substitute and in lieu thereof as her own land."

And now John Witherspoon and his wife Elizabeth both being dead, the Elk Farm has descended to the plaintiffs in this action, who are the heirs at law of both the said John and the said Elizabeth.

By act of law the legal estate of the father and the equitable estate of the mother have united in their children and heirs at law, so that the lands are now just where they would have been had everything been done which ought to have been done; that is, if the Elk Farm had been settled upon the wife in lieu of her Calloway lands. When John Witherspoon received the money for the Calloway lands he held it upon trust for his wife, and his estate became responsible to her for that amount.

This was a constructive or implied trust, such as is raised between persons who are brought together into a relation implying confidence, and is embraced by the statute of frauds. The authorities cited on the argument by Mr. Smith, and many other cases, show that the Courts will enforce parol agreements between the husband and wife, especially when the wife is not a mere volunteer. The demand of Elizabeth Witherspoon did not rest upon the moral duty or voluntary bounty of her husband, but having parted with her own lands she was entitled to say, I have paid *valuable consideration,* there has been the utmost (454) good faith on my part, and, like any other creditor, I must have money or property sufficient to pay my debt.

The case most relied upon by the defendants' counsel to defeat this view is *Smith v. Smith,* 60 N. C., 581; but the plaintiffs here are not seeking to have a specific performance, as in that case, so as to be met by the statute of frauds, but the law having cast the descent upon them, in Confederate phrase, they only "wish to be let alone."

While it was held in *Smith v. Smith* that the wife was not entitled to a specific performance of the contract between herself and husband, yet the Court says: "We think the wife is entitled under the contract to the proceeds of her land which was sold in consequence of it, subject to the interest which her husband, as such, had in the land. * * * So far as it entitles her to the money for which her land was sold, the contract must be considered in this Court as having been executed at the time when the price of the land was received by her husband."

The pleadings show that the Elk Farm has been sold upon the petition of the defendant Clarke, the administrator of John Witherspoon, to pay debts, and that the sale has been reported to Court, but that it has not been confirmed, "and that the order of sale was made without prejudice to the plaintiffs' claim."

We declare our opinion to be that the plaintiffs are entitled to the lands in controversy, free from the demands of Clark, the administrator, and all who claim under him.

Let this be certified, to the end that the Superior Court may proceed according to law.

Judgment reversed and case remanded.

PER CURIAM. Judgment reversed.

Cited: German v. Clark, 71 N. C., 420; *Dula v. Young,* 73 N. C., 69; *Gully v. Macy,* 81 N. C., 364; *Cunningham v. Bell,* 83 N. C., 330; *George v. High,* 85 N. C., 101; *Hackett v. Shuford,* 86 N. C., 150; *Cade v. Davis,* 96 N. C., 142; *Brown v. Mitchell,* 102 N. C., 373; *Battle v. Mayo, Id.,* 439; *Woodruff v. Bowles,* 104 N. C., 208; *Osborne v. Wilkes,* 108 N. C., 667; *Blake v. Blackley,* 109 N. C., 264; *Faggart v. Bost,* 122 N. C., 519, 520.

(455)

W. W. WOODFIN v. GEORGE BEACH and others.

When the allegations in the complaint upon which it is sought to set up injunctive relief are fully met by the answer, the restraining order first issued will be set aside and an injunction until the hearing refused.

MOTION to set aside a restraining order, heard by *Henry, Judge,* at chambers in BUNCOMBE County, 26 August, 1873.

The plaintiff in his complaint demanded that the defendants should be enjoined from selling certain lands under the provisions of a deed in trust, alleging irreparable injury, and on 4th August obtained a restraining order until the 26th of the same month, when the defendants were summoned to appear. The defendants appeared and answered, and his Honor refused to continue such restraining order to the hearing; from which judgment plaintiff appealed.

McCorkle & Bailey, for appellant.

J. H. Merrimon, contra.

READE, J. We agree with his Honor that the injunctive relief set up in the complaint is fully met by the answer.

There was, therefore, no error in setting aside the restraining order and refusing the motion to grant an injunction until the hearing.

This will be certified, to the end that the parties may proceed as they may be advised.

PER CURIAM. Judgment accordingly.

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(456)

J. FRONEBERGER, administrator, v. JOHN G. LEWIS, administrator.

1. It is against the policy of the law to allow an administrator to buy at his own sale, and when he does so those interested have their election to treat the sale as a nullity and set it aside, or to let the sale stand and demand a full price.
2. When the Judge below does not find the facts upon which he overruled the defendant's exceptions, and the defendant not having requested him to find such facts, this Court will remand the case that the facts may be found either by his Honor or in a *case* under The Code.

(*Ryden v. Jones,* 8 N. C., cited and approved).

CIVIL ACTION, tried Fall Term, 1873, GASTON Superior Court, before *Logan, Judge.*

The facts necessary to an understanding of the points decided in this Court are fully set out in the opinion of *Justice Reade.*

Upon the return of the report of the referee both plaintiff and defendant excepted to the same. And from the judgment of the Court overruling certain of his exceptions the defendant appealed.

Schenck, for appellant.
J. H. Wilson and *M. A. Moore, contra.*

READE, J. The defendant appealed from the order overruling his own exceptions and from the order allowing one of the exceptions of the plaintiff. We will first consider the order allowing the plaintiff's exception.

As preliminary, we remark that the finding of the facts by his Honor are conclusive upon us. We cannot review him. We review only his legal inferences.

The facts as to the plaintiff's exception are that the defendant, as administrator, obtained license from the proper Court to sell the real estate of his intestate to pay debts, and that at the sale he bought the land for $705, which was worth $2,000.

It is against the policy of the law to allow an administrator to buy at his own sale. And when he (457) does so, those interested have their election to treat the sale as a nullity—in this case to have the sale set aside and a new sale ordered—or to let the sale stand and demand a full price. *Ryden v. Jones,* 8 N. C., 497. The latter course was pursued here. We agree with his Honor in allowing the plaintiff's exception.

There were seven exceptions filed by the defendants, involving both facts and law. His Honor overruled the exceptions, but found no facts which enable us to see whether he decided the law right or wrong. If he had stated the facts upon which he overruled each of the defendant's exceptions, plainly and briefly, as he did the facts upon which he allowed the plaintiff's exception, we would have no difficulty. But this is not done.

Upon the announcement of his Honor's decision overruling the defendant's exceptions, if the defendant desired the facts to be found by his Honor he ought to have said so; and then, if his Honor had refused to find and state the facts, the defendant ought to have excepted on that account, and made that refusal the basis of his appeal; and then we would declare that there was error in refusing to find and state the facts, and remand the case, in order that the facts might be found and stated. The defendant, however, did not pursue that course, but appealed generally, without any specific exception upon which he appealed, and so he has left us at sea as much as his Honor has. This might have been remedied if the counsel in the case made for this Court had plainly and briefly stated the facts bearing upon each exception.

But the case states no facts bearing upon any one of the exceptions, but refers us "to the testimony and exhibits taken before the referee, the record of the case, the report, the exceptions and the decree." As there are only seventy pages of these, it would not be impossible for us to consult the references; but the Constitution forbids us to do so. "No issue of fact shall be tried in this Court." It might conform to strict practice to affirm what his Honor did, because there is no specific exception to what he did showing error.

But the amounts are large, and the practice not very (458) well settled, and injustice might be done. We therefore remand the case, that the facts may be stated upon which each one of the defendant's exceptions was overruled. This may be done by his Honor, or in a case under The Code.

We do not want the testimony, because to that we are forbidden to look; but the *facts*. State the facts applicable to each exception, from which the Judge drew the legal inference that it ought to be overruled, just as he stated the facts upon which he allowed the plaintiff's exception.

Let this be certified, and the cause remanded.

PER CURIAM. Judgment accordingly.

BYNUM, J., did not sit.

Cited: Froneberger v. Lewis, 79 N. C., 428; *Tayloe v. Tayloe,* 108 N. C., 73; *Maxwell v. Barringer,* 110 N. C., 83; *Cole v. Stokes,* 113 N. C., 273.

ROBERT H. AUSTIN, County Treasurer, v. HENRY T. CLARKE.

All questions of practice and procedure as to amendments and continuances arising on a trial in the Court below are in the discretion of the presiding Judge, from whose judgment thereon there is no appeal.

(C. C. P., sec. 133).

CIVIL ACTION, motion to file an amended answer, tried by *Moore, Judge,* Fall Term, 1873, Superior Court of EDGECOMBE.

The plaintiff, Treasurer of Edgecombe County, sued the defendant, the former chairman of the Court of Pleas and Quarter Sessions of that county, for the balance of a fund in his hands belonging to the county. Defendant answers the complaint, and the plaintiff demurred to the answer. His Honor sustained the demurrer, whereupon the plaintiff moves for judgment, and defendant moves for time to file amended answer. The plaintiff's motion is refused and time given to defendant.

(459) From this judgment plaintiff appealed.

Battle & Son, for appellant.
No counsel *contra* in this Court.

BYNUM, J. The C. C. P. invests the Court with ample powers, in all questions of practice and procedure, both as to amendments and continuances, to be exercised at the discretion of the Judge presiding, who is presumed, best, to know what orders and what indulgence will promote the ends of justice, in each particular case. With the exercise of this discretion, we cannot interfere, and it is not the subject of appeal. C. C. P., sec. 133.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: McCurry v. McCurry, 82 N. C., 298; *Gilchrist v. Kitchin,* 86 N. C., 22; *Henry v. Cannon, Id.,* 25; *Kendall v. Briley, Id.,* 58; *Long v. Logan, Id.,* 538; *Penniman v. Daniel,* 93 N. C., 334; *Jaffray v. Bear,* 98 N. C., 59; *Clemmons v. Field,* 99 N. C., 402; *Griffin v. Light Co.,* 111 N. C., 438; *Woodcock v. Merrimon,* 122 N. C., 735.

ISAAC JARRATT and others, administrators, v. H. P. MARTIN.

The surety on a bond is entitled to all the legal and equitable defenses to which his principal is entitled, which attached to or was connected with the debt evidenced by such bond; and it is competent for such surety to introduce any evidence tending to set up such defense; for instance, to prove a set-off or counter claim contracted in reference to the debt sued upon.

CIVIL ACTION, to recover the amount of a bond, tried before *Cloud, Judge,* Spring Term, 1873, Superior Court of YADKIN.

The action was originally commenced against T. S. Martin and the present defendant, who was his surety upon the following bond, the basis of the present suit:

"On the first day of November next, we promise to pay R. C. Puryear four thousand dollars, it being the purchase-money for a tract of land, and has nothing to do with any other dealing between us, for value received. Witness our hands and seals, 28 September, 1852." And (460) signed

T. S. MARTIN,
H. P. MARTIN.

T. S. Martin, the principal in the foregoing bond, having filed his petition and been adjudged a bankrupt a short time before the commencement of this action, at a subsequent term it was discontinued as to him upon the suggestion of his bankruptcy and continued against the defendant, H. P. Martin, alone. The execution of the bond was not denied.

On the trial, the defendant offered to prove by T. S. Martin, that at the time the bond was given, the plaintiff's intestate, the obligor, was largely indebted to him, T. S. Martin, the principal therein, and that it was agreed between them that the indebtedness should go as a payment on the land, and the balance was to be paid by him by lifting debts against plaintiff's estate; and that he did lift debts by direction of said intestate to an amount larger than the bond. The plaintiffs' counsel objected to the introduction of this testimony, and his Honor excluded it.

Defendant then offered to prove by the same witness, that the bond had been fully paid off by him, and that the intestate had so acknowledged and had promised to deliver up the bond upon the first convenient opportunity. To this evidence the plaintiffs likewise objected, and the Court ruled it out.

Defendant offered to prove by another witness, several notes given by the intestate to the said T. S. Martin, some prior and some subsequent in date to the bond sued on, and which was set forth in the answer as payments and counter claims. This evidence was also objected to by plaintiffs, on the ground that these notes had been surrendered by said T. S. Martin in his schedule, and had passed to his assignee in bankruptcy. Defendant offered to prove by the assignee, that T. S. Martin had surrendered these notes to him, subject to a settlement, by deducting the amount of the bond, now in suit, from the amount of the note so surrendered, and that the assignee accepted them and holds them (461) with that understanding at this time. To this plaintiffs again objected, and his Honor rejected the testimony.

The jury returned a verdict for the plaintiff for the full amount of the bond, less the credits endorsed. Judgment in accordance with the verdict, from which defendant appealed.

McCorkle & Bailey and *Armfield,* for appellants.
Brown and *Batchelor & Son, contra.*

READE, J. There is no doubt of the general principle, that the defendant, H. P. Martin, who is surety in the bond sued on, is entitled to all the legal and equitable defenses to which his principal, T. S. Martin, was entitled, which attached to or was connected with the debt sued on; for instance, to all payments endorsed and to all set-offs and counter claims. Whether he would be entitled to the benefit of any independent claim of his principal against the creditor, as for instance, a bond, so that his principal could not assign it to another, is not necessary to be decided in this case.

If, therefore, the defendant can prove what he proposed to prove, that his principal had claims against the creditor, which were contracted with reference to the bond sued on, or which were agreed to be in liquidation in whole or in part, it is clearly competent for him to do so. This proposition would probably not be denied if it stood alone; but it is objected that when the principal debtor went into bankruptcy he listed the claims which he had against the plaintiff, and thereby they were assigned to the assignee in bankruptcy by operation of law, and will have to be paid by the plaintiff to the assignee. We suppose this would not be so even if they were listed by the bankrupt without an express saving of, or reference to the rights of the plaintiff; but certainly it is not so, if, as the defendant offered to prove, they were rendered in bankruptcy with express reference to and ratification (462) of the plaintiff's claim against the bankrupt. In which case the assignee in bankruptcy would take the claims *cum onere.*

From what has been said it will be seen that the assignee in bankruptcy ought to be a party, because the plaintiff ought not to be put to the risk of allowing the claims to the defendant, and having to pay them to the assignee in bankruptcy.

The question as to the competency of the bankrupt to testify as to transactions between him and the deceased creditor, Puryear, is not necessary to be decided now, and will probably not arise on the next trial.

There is error.

PER CURIAM. *Venire de novo.*

Cited: Wilson v. Bank, 72 N. C., 626.

STATE on the relation of STEPHEN LASSITER and others v. JOHN R. PHILLIPS and others.

1. A defendant who offers himself as a witness in his own behalf may be asked if he has not disposed of his property so as to avoid the payment of any recovery in the action then being tried; and if since such disposal he has not been engaged in selling the same property and his answers are proper subjects for comment before the jury.
2. It is also competent to ask such witness if he had not gone to New York to consult a spiritualist in regard to the money, the subject of the present controversy.

(*Nichols v. Pool,* 47 N. C., 23, cited and approved).

CIVIL ACTION, on the official bond of the County Treasurer of LENOIR County, tried before *Russell, Judge,* Spring Term, 1873, Superior Court of GREENE, to which Court it had been removed upon affidavit.

The following are the substantial facts as sent up with the record:

The only question was whether or not one W. H. N. Hunter, sheriff of said county of Lenoir, on 3 July, (463) 1871, paid over to said treasurer the sum of $3,050 of the funds of said county.

The plaintiffs, to prove that said money had been paid as alleged, introduced in evidence a receipt of said date and for said sums, purporting to be signed by said treasurer, and also a witness who swore that the said signature was in their opinion that of said treasurer.

Powell, the treasurer, died some twenty days after 3 July, 1871. Defendants, to prove that the signature was not genuine, introduced one Cox who swore that he did not know the handwriting of Powell until he examined it after Powell's death and after this controversy began—that he then looked at several signatures and writing which were shown to him as and believed by him to be Powell's, that from this comparison he had formed his opinion; that his examinations were made with reference to this controversy. Court held that witness was not qualified to express an opinion as to the handwriting. Defendant excepted.

Defendant Wadsworth was introduced and examined by defendant. On cross-examination plaintiff asked him if he has not disposed of his property so as to avoid a judgment in this action. To this question defendant objected. Court admitted the question, saying that it was a collateral impeaching question and that plaintiff would be concluded by the answer. Defendants excepted.

Wadsworth in answer to the question said that he had recently sold most of his property; that he had sold his stock of goods to his brother-in-law and remained in possession thereof, selling as agent; that he sold out because trade was dull, but that he did not sell to avoid a judgment. In arguing to the jury the plaintiff's counsel criticised Wadworth's statement, contending that it was false and using it to attack the witness and to impeach his testimony, when defendant's counsel interrupted, objecting to his argument on the ground that plaintiff was bound by the witness' reply.

(464) The Court allowed the counsel to proceed with his argument. Defendants excepted.

This witness, Wadsworth, was also asked by plaintiff on cross-examination if he had not gone to New York and consulted a spiritualist to find out about the money. Question objected to by defendants on the ground that it was irrelevant and tended to ridicule the witness and prejudice the case with the jury. Objection overruled by the Court on the ground that it went to the credit of the witness and was therefore competent as a collateral impeaching question. Defendants excepted.

On the trial it became material for the plaintiff in order to support a statement of one of his witnesses to show that a county order for payment of a pauper's coffin was considered and treated by the officials of Lenoir County as a "poor order," and that this was so in July, 1871. For this purpose plaintiff introduced a witness who said that he had been a member of the board of commissioners since September, 1872; that he did not know of his own knowledge what the custom was before that time, but that since he went in office the board had made no change of the rules and customs existing before that time, and that, so far as he knew, a coffin order was always looked upon and recognized and treated as a "poor order." This evidence was objected to by defendants but admitted by the Court. Defendants excepted.

The jury returned a verdict in favor of the plaintiffs. Judgment in accordance therewith; from which judgment defendants appealed.

Smith & Strong, for appellants.
Faircloth & Granger, contra.

PEARSON, C. J. 1. The ground taken in regard to a comparison of handwriting was yielded on the argument.

2. The defendant Wadsworth, as we must infer, had impeached the genuineness of the receipt, and it was relevant to ask him if he had not conveyed away his property, for it tended to show an apprehension on his part that (465) the receipt would be established.

3. The "white washing" given by Wadsworth to the fact that he had transferred most of his property, including his stock of goods, to his brother-in-law, "but had remained in possession, *selling as agent,*" was a proper subject of comment to the jury.

The objection is, this being a collateral impeaching question cannot be "pushed" any further than the answer, which must be taken as conclusive—that is true, so far as *calling witnesses* to contradict, for it might lead to endless inquiries on a collateral matter. But we have never understood the rule to preclude comment upon the manner of the witness, as if he hesitates and evinces embarrassment, or upon the answer, as if it be inconsistent, and an attempt to gloss over a dishonest act.

4. We can see no objection to the question "if the witness had not gone to New York and consulted a spiritualist to find out about the money?" It tended to show that the witness had doubts about the genuineness of the receipt and was impressed with the necessity of invoking further light upon the subject. So it was not irrelevant; and although it might have had the effect of exposing the witness to ridicule, still, as he offered himself for a witness in his own behalf, it was well to let the jury be informed of all of the surroundings so as to enable them to pass upon his credit.

5. In regard to the cost of the coffin for a pauper being a "poor order" (supposing it to have been a material subject of inquiry), it would seem to be almost a self-evident proposition; and the statement of the witness, that "he had been a member of the board of commissioners since September, 1872; that when he came into office it was the rule and custom of the board to treat the cost of the coffin of a pauper as a poor order, and that this was deemed a matter of course, without any change in the rules," certainly did tend to show that such had been the rule in July, 1871. This presumption of the fixedness in the rules and customs of a (466) board of commissioners, is wholly unlike the instance of tenancy at one date, not being evidence of tenancy at a prior date. So, *Nichols v. Pool,* 47 N. C., 23, cited on the argument has no application.

No error.

PER CURIAM. Judgment affirmed.

LAWRENCE J. HAUGHTON v. THE COMMISSIONERS OF JONES COUNTY.

The provision of section 6 (7), Art. V, of our State Constitution, restraining county commissioners from levying a tax more than double the amount of the State tax, does not apply to taxes levied to pay debts against the county existing at or before the adoption of the Constitution.

(*Street v. Comrs., post,* 644; *Simmons v. Wilson,* 66 N. C., 336; *University Railroad Co. v. Holden,* 63 N. C., 410, cited and approved).

CIVIL ACTION, to enjoin defendants from levying certain taxes, heard before *Clarke, Judge,* at Spring Term, 1873, of JONES Superior Court.

Upon the application of the plaintiff, *Judge Watts,* at chambers, granted an injunction against the defendants, restraining them from levying more taxes than two dollars on the poll, and two dollars on the three hundred dollars worth of real estate.

At Spring Term, 1873, the case coming up upon the complaint, answer and proofs the Court found the following facts:

That the defendants levied for the year 1872, for county purposes, a tax of $1.05 on the $100 valuation of property, and $3.15 on the poll; and that 28 1-3 cents thereof on the $100 valuation of property and 85 cents on the poll were levied for current expenses and the residue (467) thereof was levied for and to be applied to the payment of debts contracted prior to the adoption of the present State Constitution; and that the defendants subsequently and in the same year levied a further tax of 50 cents on the $100 valuation of property, in obedience to and for the payment of two several writs of *mandamus* upon judgments previously obtained upon debts contracted prior to the adoption of the present Constitution, amounting in the aggregate, with costs of suit, to about $1,400; and that $1,500 of said tax levy was levied and applied for the purpose of building a bridge in said county—the question of levying said tax having been previously submitted to a direct vote of the people of said county, a majority of whom approved and voted for said tax. It was also found that $675 of said tax was levied and used to repair certain bridges which had almost become impassible; that the aggregate valuation of the property of said county is about $680,000, and that the plaintiff is a resident of Jones County.

His Honor thereupon ordered that the injunction ordered be vacated and dissolved. From which order the plaintiff appealed.

Haughton, for appellant.
Lehman, contra.

READE, J. It is true, as contended for by the plaintiff, that as a general rule the county commissioners cannot levy for county purposes a tax more than double the State tax. Const., Art. V., sec. 7. But that provision was not intended to apply to taxes laid to pay debts existing at the time of the adoption of the Constitution. And if it had been so intended it would have been in conflict with the Constitution of the United States, as impairing the obligation of contracts. *Street v. Comrs., post,* 644; *Simmons v. Wilson,* 66 N. C., 336; *University Railroad v. Holden,* 63 N. C., 410.

The excess of taxation complained of in the case (468) before us, was to pay debts existing prior to the adoption of the Constitution, and therefore was properly levied.

The tax levied to build a bridge, etc., in excess of the limit, was sanctioned by a vote of the qualified voters of the county at an election held for that purpose, and falls under Const., Art. VII, secs. 5 and 7.

For these reasons we think the restraining order was properly vacated and the injunction refused.

We have not overlooked the fact that the complaint does not allege the probability of irreparable injury or the insolvency of the defendants.

Nor the fact alleged in the answer that every other taxpayer in the county has paid his taxes except the plaintiff.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

Cited: Uzzle v. Comrs., post, 565; *Clifton v. Wynne,* 80 N. C., 147; *Jones v. Comrs.,* 107 N. C., 259.

C. DOWD, administrator, v. THE N. C. RAILROAD COMPANY.

The value of a note payable on 1 January, 1866, in Confederate money, given for the hire of slaves for the year 1865, is the value of such hire for the term of hiring, although the slaves were emancipated during the time. Such contract bears interest from 1 January, 1866.

(*Woodfin v. Sluder,* 61 N. C., 200; *Alexander v. Comrs.,* 67 N. C., 330; *Nichols v. Pool,* 47 N. C., 23, cited and approved).

CIVIL ACTION, to recover of defendants certain notes, tried July (Special) Term, 1873, Superior Court of MECKLENBURG, before *Moore, Judge.*

The following is one of the notes (the other being similar) upon which this action is founded:

(469)

"No. 23. OFFICE OF THE N. C. RAILROAD COMPANY,
COMPANY SHOPS, 1 January, 1865.

"On the first day of January, 1866, the North Carolina Railroad Company promises to pay to Dr. R. C. Jenkins, or order, three thousand six hundred dollars for hire of the following hands, to-wit, Stout, Jerry, John and Horace, for the year 1865; and the said Railroad Company agrees to furnish to each of said hands the usual clothing to hired hands—two pair of shoes one hat, one blanket, or substitutes, payable in Confederate money, without interest, at the company's office.

"Witness the hand and seal of the president of the company. THOS. WEBB, *President.* [Seal.]
"$3,600."

The defendant does not deny the execution of the note, but in answer alleges a willingness and ability to pay according to its tenor—at the office of the company in Confederate money.

The jury rendered a verdict in favor of the plaintiff for $1,162, of which $800 was principal, under the charge of the Court that he was entitled to recover the value of the services of the slaves for the term of hiring. Defendant moved for a new trial; motion refused. Judgment and appeal by defendant.

Wilson & Son and *R. Barringer,* for appellant.
Vance and *Burwell* and *Dowd, contra.*

READE, J. If Confederate money had been in existence as a circulating medium 1 January, 1866, when the note matured, the defendant had the privilege of paying it off in that currency, by the very terms of the note itself.

As there was no such currency when the note matured, if the consideration had been Confederate money loaned, then the plaintiff would have been entitled to recover the value of the Confederate money, at the date of the contract, viz., at the date of the note. As the consideration was not Confederate money, but was for the hire of slaves for the year (470) 1865, viz., a thing or property, then the value of the property at the time of the contract is the standard; or to use the language of the statute, "the value of the contract in present currency is the standard." That must be understood to mean in this case the value of the hire of the slaves for the term of hiring, viz., during the year 1865, and this although the slaves were emancipated in the meantime. *Woodfin v. Sluder,* 61 N. C., 200.

The other points are not material. It was not necessary that the plaintiff should have demanded payment at the defendant's *office,* because if any demand would have been necessary under any circumstances, here the case shows that it would have amounted to nothing, for the defendant insisted then, and insists now, that he had the right to pay the bond in Confederate money, which was worthless; and he now brings the Confederate money into Court, which, he says, he set apart and always kept for that purpose—showing that a demand would have been useless. And furthermore, if a note be payable at a particular time and place, a demand at the time and place need not be averred or proved. It is otherwise if it be payable *on demand* at a particular time and place. *Alexander v. Comrs.,* 67 N. C., 330; *Nichols v. Pool,* 47 N. C., 23.

Interest is to be calculated on the value of the contract from 1 January, 1866, when the note matured.

No error.

PER CURIAM. Judgment affirmed.

(471)

DAVID MOORE v. W. H. EDMISTON.

1. To vitiate and avoid a verdict, it must appear upon the record that undue influence was brought to bear on the jury. All other circumstances of suspicion address themselves exclusively to the discretion of the presiding Judge in granting or refusing a new trial, which discretion is not a proper subject of review by this Court.
2. To give parties the benefit of the provision of section 299, C. C. P., allowing an appeal from an order granting or refusing a new trial, the presiding Judge should put upon the record the matters inducing the order, so that this Court can see whether the order presents a matter of law which is a subject of review, or matter of discretion which is not.

(*State v. Miller,* 18 N. C., 500; *State v. Tilghman,* 33 N. C., 573; *Bank v. Tiddy,* 67 N. C., 169; *Love v. Moody,* 68 N. C., 200; *Vest v. Cooper, Ibid.,* 131, cited and approved).

CIVIL ACTION, tried at Spring Term, 1874, of the Superior Court of CALDWELL, before *Mitchell, Judge.*

The jury rendered their verdict in favor of the defendant upon all the issues submitted. Plaintiff moved for a new trial, which his Honor granted for the reason that after the case had been given to the jury and they had retired to make up their verdict, the jury, without leave of the Court, and without the knowledge or consent of the plaintiff, separated and dispersed themselves, and whilst so dispersed partook of refreshments and remained so dispersed and separated, conversing with other persons for the space of one hour.

The jury had been allowed to separate without objection during the trial of the cause at previous adjournments of the Court. There was no evidence that the jury had been tampered with during their separation. The Court granted the new trial on the ground of their separation, from which judgment the defendant appealed.

Malone, with whom was *Bailey & McCorkle,* for defendant:

It is well settled that the separation of the jury does not render the verdict void. The doctrine is (473) fully discussed in *State v. Miller,* 18 N. C., 500; 2 Bat. Dig., 817.

We respectfully refer also to the following authorities: *State v. Sparrow,* 7 N. C., 487; *State v. Lyttle,* 27 N. C., 58; *State v. Godwin,* 22 N. C., 401; *Adams v. People,* 47 Ill., 376; *State v. Braenen,* 45 Mo., 329; *Stephens v. People,* 19 N. Y., 547; *Davis v. State,* 15 Ohio, 72; *King v. Wolfe,* 1 Chitty, 401; Hilliard, N. T., 798, note; *Evans v. Foss,* 49 N. H., 490; at p. 497, bottom; *Powell v. Jopling,* 47 N. C., 400; Powell App. Proceedings, 195, *et seq.*

Folk & Armfield, contra:

There is a marked distinction between awarding a new *venire* because the verdict is bad and setting a verdict aside and granting a new trial. The former must be for matters apparent on the record and is of right. The latter may be for matter not appearing on the record, and is addressed to the sound discretion of the Court. The former is matter of error, and must be noticed by the appellate court; the latter has heretofore been considered not matter of error, or elsewhere examinable (*Chief Justice Wills, Wytham v. Lewis,* 1 Wilson, 55.). It is not necessary to ascertain to which of the above-stated principles the present case belongs, or discuss the point stated by *Reade, J.,* in *Love v. Moody,* (474) 68 N. C., 200; for the following proposition is clearly sustained by reason and authority, viz.: If the jury, after they are directed to retire and consider of their verdict without any necessity therefor, and without the leave of the Court, disperse and go at large, the Judge in the exercise of his discretion may set the verdict aside and grant a new trial, unless the suspicion arising from such misconduct is removed by affidavit or otherwise. The only exception admitted to this proposition is where the jury disperse from necessity, and this exception seems very ancient. In *King v. Mozely,* 1 Chitty, 401, 2 Barnwell and Alderson, there is a note by the reporter of a case decided in the Exchequer Chamber between the *Bishop of N.* and the *Earl of Kent.* The jurors were chosen, tried and sworn, and whilst the parties were giving their evidence there came such a storm of thunder and rain that some of the jury departed without leave of the Court; and after several arguments and adjournments it was held, by four Judges against three, that the verdict was good, for they had a reasonable ground for departing because of the storm (it seems they stood in the open street). Bro. Abr., Verdict, p. 19. In Bro. Abr., Title Jurors, p. 13, it is said that the jurors may separate by reason of a great tempest, or affray, or the falling of the house, and the same law is of a fire in the house. For the cause of the dispersion prevents suspicion of any misconduct. But where the jury disperse without necessity or leave of the Court, the authorities are uniform to sustain the position that their verdict ought not to stand. Lord Coke lays it down as a fundamental rule that by the law of England a jury, after the evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, without speech to any one unless it be the bailiff, and with him only if they be agreed. Co. Lit., 227. The jury might eat and drink in view of the Judge. Com. Dig., Title Pleader, Verdict, 346. This part of the rule was intended to guard rather against delay, than corruption, and was always regarded as not absolutely inflexible; but one which might be accommodated to the circum- (475) stances of each case. *Gaston, J., State v. Miller,* 18 N. C., 520. But the first great purpose of the rule, the securing of the jury from the possibility of improper intercourse, must ever forbid any dispensation from that part of it which requires that they shall be kept together. In Dalt., chap. 185, it is said after evidence has been heard and the jury retire to consider of their verdict, the oath administered to the bailiff sworn to keep them is as follows:

"You swear that you shall keep this jury without meat, drink, fire or candle. You shall suffer none to speak to them, neither shall you speak to them yourself, only to ask them whether you are agreed, so help you God."

So in Com. Dig., Title Enquest, it is laid down that "after the evidence is given, the jury ought to stay together till they agree of their verdict." If a great tempest happens, the jury may depart from the place where they are to consider of their verdict. Vin. Abr., Title Trial G. In 4th Bla. Com., 560, it is laid down, when the evidence is closed, the jury cannot be discharged until they have given in their verdict, but are to consider of it, and deliver it with the same forms as in civil cases. (477)

By sec. 299, C. C. P., an appeal only lies to the supreme Court from an order of the Superior Court granting a new trial *"upon a matter of law or legal inference,"* and this does not alter the law as it stood before the adoption of The Code, and then the action of the Judge below in granting or refusing a new trial for any matter not "of law or legal inference," was discretionary with him and could not be reversed in the Supreme Court. See *Banks v. Hunter,* 12 N. C., 100; *Lindsey v. Lee, Id.,* 640; *McRea v. Lilley,* 23 N. C., 118; *Tyrell v. Wiggins, Id.,* 72; *Wall v. Hinson,* 1 Ired., 276; *McCulloch v. Doak,* 68 N. C., 267; *Long v. Holt, Id.,* 53.

Bynum, J. This is a civil action, here by appeal from an order of the Court below, setting aside a verdict for the defendant and granting a new trial upon the following state of facts found by his Honor, to-wit: "In this case it appearing from the affidavits filed by plaintiff to the satisfaction of the Court, that after the testimony was all given, the argument of counsel concluded, and after the jury had been charged by the Court and directed to retire and consider of their verdict, and before they had found said verdict the said jury, without leave of the Court and without the knowledge or (478) consent of the plaintiff's counsel, separated and dispersed themselves, and whilst so dispersed partook of refreshments and remained so separate and dispersed, conversing with other persons for the space of one hour. It is therefore considered, ordered and adjudged by the Court that their said verdict in this case be set aside and a new trial be had. Wherefore, let a jury come," etc.

Was this error in law?

Before answering this question, it is necessary to enquire whether the granting or refusing a new trial by the Judge below is a matter of law or a matter of discretion, for if it is the latter, this Court can seldom review its exercise; if the former, the exercise of the power is always the subject of review here.

In the *State v. Miller,* 18 N. C., 500, the facts were, that during the progress of the trial the jurors retired under the charge of an officer by permission of the Court. They all soon returned but one, who came in two minutes afterwards and excused himself by stating that he had stepped aside to obey a call of nature. The prisoner proposed to prove, and it was assumed as a fact, that the juror had gone into a grocery near by for a drink. The prisoner was convicted of murder and moved the Court for a new trial for misconduct in the jury, which motion was refused, and he appealed to the Supreme Court. The judgment was there affirmed by a divided Court. *Ruffin, C. J.,* in delivering the opinion of the majority, holding that while the conduct of the juror was irregular, yet as it did not appear that he was tampered with or the prisoner prejudiced thereby, the mere misconduct of the juror did not vitiate the verdict so as to render it, in law, null, but that it was a matter wholly addressed to the presiding Judge to grant or refuse a new trial. *Gaston, J.,* in his dissenting opinion, contended that the verdict was vitious, and in law void, and that the prisoner was, therefore, as a matter of right, entitled to a *venire de novo.*

For the purposes of this case, it matters not which (479) of these eminent Judges was right, or which was wrong, for by the opinion of either or of both the Judge, in our case, had the right to set aside the verdict and grant a new trial, the one making it a matter of law, the other a matter of discretion. If it was a question of right, as contended by *Gaston, J.,* then the verdict *must* be set aside; if it was a matter of discretion, as held by the *Court,* then the Judge *may* set it aside, so *quacunque via data,* the order of the Judge granting a new trial was proper.

We are not called upon now to decide the vexed question as to what acts of misconduct in jurors, after they are charged with a case and retire to enquire of their verdict, so vitiate their verdict as to constitute a mistrial, the legal effect of which is that it must be set aside as null and void, and a *venire de novo* awarded. That question was fully discussed and considered in Miller's case, before cited, but no conclusion was then arrived at.

The same question again came before this Court in the *State v. Tilghman,* 33 N. C., 573. The prisoner was convicted and moved for a *venire de novo* for the misconduct of the jury, upon the following facts found: The jury, under the charge of an officer, was confined in the ordinary jury room from Thursday night to Saturday morning before returning their verdict. While out, the members of the jury separated often to obey the calls of nature, though under the charge of an officer. One juror visited a drug store, one hundred and fifty yards off, to procure medicine. He was under the charge of an officer and conversed with no one except the keeper of the drug store, who asked him if they had agreed in their verdict, to which he replied that "they had not." Another juror separated himself from his fellows and stood outside of the jury room with the door closed, and conversed ten or fifteen minutes with one Richardson, privately, about what did not appear. The jurors while out, ate and drank with permission of the Court, part of the time, and (480) when enjoined by the Court not to eat or drink, they violated the order, contrary to the wishes of the officer having them in charge. Several jurors wrote notes and letters and dropped them from the windows of their room, and they also received letters from persons not of the jury. The contents of the letters did not appear to the Court. Some of the jurors conversed from the windows with persons in the street on various subjects and *about this suit.* What was said did not appear. Negro servants and children of the jurors had access to the jury room, the servants to carry food and clothing, and the children to see their fathers. The Court being of opinion that the separation and other irregularities of the jury did not vitiate the verdict, pronounced judgment of death upon the prisoner.

Upon appeal, the case was argued in behalf of the prisoner, with great learning, and all the cases reviewed. The judgment of the Court below was affirmed by a unanimous bench.

Pearson, J., in delivering the opinion of the Court, said: "Perhaps it would have been well had his Honor, in his discretion, set aside the verdict and given a new trial as a rebuke to the jury, and an assertion of the principle that trials must not only be fair but above suspicion.

"This, however, was a matter of discretion, which we have no right to reverse. Our enquiry is, was the misconduct and irregularity such as to vitiate the verdict, to make it in law null and void and *no verdict?*

"In the consideration of this question we have had occasion to review *State v. Miller,* 18 N. C., 500, and it seems to us that the decisions of the Court and the distinction between cause for a new trial, which is a matter of discretion, and cause for a *mistrial,* which is a matter of law, is fully sustained by authority and by reason. * * *

"We wish not to be understood as disclaiming a right to grant a *venire de novo* when it is made to appear on the record that there has not been a fair trial; on the contrary, we assert that right, whether it is to be exercised for or against the prisoner. We take this plain position: If the circumstances are such as merely put suspicion on the ver- (481) dict, by showing, not that there *was,* but that there might have been, undue influence brought to bear on the jury, because there was opportunity and a chance for it, it is a matter within the discretion of the presiding Judge. But if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or prisoner, or if they be solicited and advised how their verdict should be, or if they have other evidence than that which was offered on the trial, in all such cases there has, in contemplation of law, been no trial; and this Court will, as a matter of law, direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner."

If, therefore, two decisions of this Court, after full argument and mature consideration, can settle this question, it must be considered at rest in this State.

In the last case, the dividing line between matter of discretion which this Court cannot revise, and matter of law, which it can review, is as clearly and distinctly drawn as the nature of such cases will permit, and sufficiently so for all practical purposes.

That line of distinction is, that to vitiate and avoid a verdict it must appear upon the record that undue influence was brought to bear on the jury. All other circumstances of suspicion address themselves exclusively to the discretion of the presiding Judge in granting or refusing a new trial. He is clothed with this power because of his learning and integrity, and of the superior knowledge which his presence at and participation in the trial gives him over any other forum. However great and responsible this power, the law intends that the Judge will exercise it to further the ends of justice, and though, doubtless it is occasionally abused, it would be difficult to fix upon a safer tribunal for the exercise of this discretionary power, which must be lodged somewhere.

Our case is favorably distinguished from the cases of Miller and Tilghman in that there new trials were re-

(482) fused and the prisoners were executed, while here a new trial was granted, and the only inconvenience seen is the trivial one of a short postponement of the case. If the defendant has merits, he need not fear a second trial, if he has none the new trial is granted in the interests of justice.

By C. C. P., sec. 299, an appeal is allowed as well from an order granting as refusing a new trial, but in either case the matter appealed from must be "of law or legal inference." Heretofore it has been the practice of Superior Courts in granting new trials not to put upon record the facts or reasons moving them thereto, and we know of no rule of law requiring it to be done. But now, to give parties the benefit of the above section of The Code, the courts should, and no doubt will, on exceptions taken by the parties aggrieved, put upon the record the matters inducing the order granting as well as refusing a new trial. The appellate court can thus see whether the order presents a matter of law which is the subject of review, or matter of discretion, which is not. In this way only, it is conceived, can the full benefit of that provision of The Code be secured to suitors. However, no difficulty of that kind arises here, for the facts upon which the new trial is granted appear upon the record, and it thereby plainly appears that the Judge exercised a discretionary power only, which this Court cannot revise, and if it could, would say was properly exercised in this case. *Bank v. Tiddy,* 67 N. C., 169; *Love v. Moody,* 68 N. C., 200; *Vest v. Cooper,* 68 N. C., 131.

PER CURIAM. Judgment affirmed.

Cited: State v. Durham, 72 N. C., 448; *Johnson v. Bell,* 74 N. C., 357; *Gay v. Nash,* 84 N. C., 335; *Thomas v. Myers,* 87 N. C., 31; *Carson v. Dellinger,* 90 N. C., 229; *Braid v. Lukins,* 95 N. C., 125; *Bird v. Bradburn,* 131 N. C., 490.

(483)

R. M. WALKER and another v. W. W. FLEMMING and others.

1. A president *de facto* of a railroad company, when a suit is pending in which his right to the office is to be tried, and just before the decision of such suit, has no right to make a distribution of the funds of the company to such creditors as he may elect to give preference.
2. For the ordinary purposes of the company, and in order to keep the machinery in motion, a *de facto* president will be recognized as having power to act.

CIVIL ACTION, tried by *Henry, Judge,* upon demurrer at Spring Term, 1873, Superior Court of BURKE.

The plaintiffs, as assignees of a certain mortgage made by the defendant, Flemming, to his co-defendant, the Western N. C. Railroad, demands that after taking an account to ascertain the indebtedness of Flemming to the road, the lands embraced in the mortgage be sold, and the balance, after paying said debt, be applied to the satisfaction of their debts against the road.

The defense set up by the road to this action is fully set out in the opinion of *Chief Justice Pearson.* The plaintiffs demurred to the answers, which was overruled by his Honor, and judgment given for defendants. From this judgment plaintiffs appealed.

Armfield, for appellants, argued:

"An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." See *Lord Ellenborough,* in *King v. Corporation of Bedford.*

He may be an officer *de facto,* "though indisputably ineligible." Though the office is not vacant, though there is an existing officer *de jure* at the time.

"The acts of an officer *de facto* are good wherever they concern a third person who had a previous right to the act, or who paid a valuable consideration for it."

"A person in office without even the form of an election might be a *de facto* officer, and all his acts would bind the corporation, unless the act of incorporation or general statute law avoided them." (484)

All the above cases and authorities are found in Angel & Ames Corp., sec. 287, p. 319 (5 Ed.). See also, Bacon's Abridg., Title Corporations, 2, 6; Angel & Ames Corp., pp. 124 and 125.

McCorkle & Bailey and *Folk, contra.*

PEARSON, C. J. Pending an action in the Superior Court, the purpose of which was to have it decided whether the "Tate board" or the "Howerton board" were entitled to the office, Tate, who held the office as president *de facto,* assumes to himself the right to make preferences among the creditors of the company, and assigns to the plaintiffs a valuable security belonging to the company, as a collateral security for their debts, and this is done a very short time before the decision in *Howerton v. Tate,* 68 N. C., 546, was announced. It is true that for the ordinary purposes of the company, and in order to keep the machinery in motion, a *de facto* president will be recognized as having power to act; for instance, his contracts for a supply of wood or to engage conductors and hands on the road are held to be valid. But the idea that a *de facto* president of a railroad company, on the eve of his departure, by judgment of the Court, can anticipate and make distribution of the funds of the company to such creditors of the company as he may elect to give preference to, is a proposition that needs no discussion.

There is no error. Judgment in the Court below affirmed, with the modification: "It is further ordered that the plaintiffs, Walker and Simonton, deliver to the Clerk of the Superior Court for the county of Burke the papers purporting to be an assignment of the mortgage set out in the (485) pleadings, to the end that the papers be cancelled so as to remove any cloud from the title of the railroad company in respect to the mortgage.

PER CURIAM. Judgment accordingly.

Cited: Sloan v. McDowell, 71 N. C., 359.

BOYLSTON INSURANCE COMPANY, of Boston, and others v. JOHN D. DAVIS.

The value of property taken under process should be assessed at the time of trial, as the taker should have the option of returning the property so taken, or of paying its assessed value. If the price of the property taken has fallen in the time, the jury should include the difference in their assessment of damages for the detention.

(*Holmes v. Godwin*, 69 N. C., 467, cited and approved).

CIVIL ACTION, tried before *Clarke, Judge,* at Spring Term, 1873, of CARTERET Superior Court.

This was an inquiry to ascertain the damages sustained by the defendant, because of the plaintiffs' taking from his possession a quantity of iron, directed to be had in the decision of this Court in a suit between the same parties, and heard at January Term, 1883, 68 N. C., 17.

The iron when taken from the defendant was on Core Banks in said county. The defendant offered to prove the value of the iron in the city of New Bern. This evidence was objected to by the plaintiffs but admitted by the Court. Plaintiffs excepted. The defendant offered evidence of the highest price of iron at any time between the taking and the pending trial. This was objected to by the plaintiffs, but admitted by the Court, to enable the jury, by comparison of prices at different times and places, to estimate the value of the iron at the place and time of caption.

Judgment against the plaintiffs and sureties on their undertaking; from which judgment plaintiffs appealed.

Greene, for appellants. (486)
Haughton and Hubbard, contra.

RODMAN, J. This case is governed by *Holmes v. Godwin,* 69 N. C., 467. The plaintiff obtained possession of the iron under his process, and it does not appear that up to the trial it had been converted or destroyed, or even removed from Core Beach. The plaintiff was entitled, therefore, to have the value assessed at the time of the trial, in order that he might exercise his option of returning it or paying its value. If the price had fallen in the interval, no reason occurs to us why the jury would not include the difference in the damages for the detention; because the plaintiffs, by wrongfully taking the possession, have prevented the defendant from selling what turns out to be his own property. So, if the iron had become deteriorated by long exposure to salt water. As for the reason of this error on the part of the Judge there must be a new trial, it is unnecessary to consider any other question. But as the same questions may be presented on another trial, and we think they are free from difficulty, it may be well enough to say that the value of the iron at Core Beach (supposing it to have continued there until the trial) is properly ascertained from its price at or near the time in any Atlantic city where there is a market for such articles, less the costs of getting it there. But we do not perceive what relation the price at a widely different time can have.

If it had appeared that the iron had been converted by the plaintiff, and its removal out of the State might be evidence of a conversion, the measure of damages for the detention would be the interest on that value. The duties paid by the plaintiff were properly recouped.

There must be a *venire de novo.*

PER CURIAM. Judgment reversed, and *venire de novo.*

(487)

MARGARET ANN DICKSON, by her guardian *ad litem*, and others v. CHARLES McD. DICKSON and others.

A testator directed, after giving some pecuniary legacies to certain grandchildren which was a charge upon the whole of his estate, that his "real and personal property remain as a common stock for the family that now make their home here, subject, neverthless, to any distribution which my executors hereinafter named may think proper to make": *Held,* that all the living children of the testator, and the representatives of the deceased children, are tenants in common of all the real and personal estate, with partition postponed until circumstances should make it necessary. The separation of the family and the death of some and the sale of the interest of one, thereby letting into the family a new and disturbing element, is such a change of circumstances as makes a partition proper.

SPECIAL PROCEEDING to obtain a proper construction of the will of William Dickson, deceased, heard and determined by *Mitchell, Judge*, at chambers in CALDWELL County, upon an appeal from the judgment of the Probate Judge, 27 November, 1873.

The will of William Dickson, under which plaintiffs and defendants claim, is in the following words:

"STATE OF NORTH CAROLINA, CALDWELL COUNTY.

"In the name of God, Amen! I William Dickson, of the county and State aforesaid, being weak in body, but of sound and perfect mind and memory, blessed be Almighty God for the same, do make and publish this my last will and testament in manner and form following, that is to say:

"1. My will is that my property be not exposed to public sale.

"2. My will is that my real and personal property remain as a common stock for the family that now make their home here. Subject, nevertheless, to any distribution which my executors, hereinafter named, may think proper to make.

"3. My will further is that my daughters, Isabella, Mary Matilda, Mira Ann and Clarissa Caroline, shall (488) have unmolested and exclusive privilege over all the domestic concerns of the house so long as they remain here; they shall be provided for off the farm with provisions and everything necessary for their support.

"4. My will further is that Eliza Abernathy have land enough annually to furnish provisions for her and family.

"5. My will further is that my three grandchildren, to-wit: William Leonard, Margaret Charity and Joseph Harvey Dickson, that they shall have at their marriage, or becoming of lawful age, seven hundred dollars each.

"6. My will is that my superannuated black people shall be supported off the plantation as long as they shall live.

"7. I do hereby nominate, constitute and appoint my sons, Charles McDowell Dickson, James F. Dickson, William W. Dickson, and my son-in-law, James C. Horton, my executors," etc.

In the complaint of the plaintiffs, Margaret Ann, a granddaughter of the testator, and J. F. Harper, the purchaser of the interest of one of the legatees in the estate of the testator, demand that the land be partitioned and allotted under the will to those entitled to it, and that an account of the rents and profits be taken, etc.

Defendants deny the right of the plaintiffs to demand a partition of the land devised in the will, also their right to have a reference for an account.

From the decision of the Judge of Probate an appeal was taken, and his Honor *Judge Mitchell,* upon the hearing, gave judgment:

"That the will of the testator William Dickson, deceased, forbids the exposure of his property at public sale.

"That he directs that his real and personal property remain as a common stock for the family that at the time of his death made their homes at his homestead domicil; subject, nevertheless, to any distribution which his executors
(489) might think proper to make; and the executors are
in loco parentis in the distribution of the property.

"The daughters named in the third item of the will are clothed with the unmolested and exclusive privilege over all the domestic concerns of the house. So long as they remain at the homestead domicil, they shall be provided for off the farm with provisions and everything necessary for their support; but any additional provision they can only receive from the executor representing the moral and parental obligation of the testator by virtue of the discretion given for that purpose.

"It is considered and adjudged that the lands mentioned and described in the complaint cannot be divided except by the official acts and delegated discretion of the executor.

"A reference is ordered to enquire and say what, if anything, is in arrears to the three grandchildren—the children of the son Joseph."

From this judgment the plaintiff Harper appealed.

Folk, for appellant.
Armfield, contra.

READE, J. The will of William Dickson, deceased, which we are called upon to construe, is one of those short-sighted instruments common to testators, who suppose that all their affairs will remain as they are, or that there will be
(495) only such changes as their desires suggest; and so
dispose of their estates without the aid of counsel.

The testator had nine living children, and three grandchildren of his tenth child, who was dead. There is nothing in his will to indicate that he had any special favorite among his children, or that there was any reason why he should have. All his living children, except one, lived with him in the same house, or upon his land, and most of them in the house with him; and it seems to have been his wish to provide for all of them in that way which would suit them best.

If we assume, what is probable, that his daughter Sarah married and moved to herself, he gave her such things as his circumstances justified, and as were necessary for her comfort, then we find all his children provided for until such time as circumstances might require his estate to be divided. To the three children of his deceased son he gave pecuniary legacies; to Mrs. Abernathy, his daughter, who lived to herself, he gave the use of so much of his land as was necessary for her support; and to all his other children who lived in the house with him he gave the use of his homestead to be occupied together, the daughters having the management in the house and his son Charles to have the management out of doors. There was no purpose to give the estate to Charles, either for himself entirely, or for himself with a *discretion* to give the others much or little, as suited him. But the purpose was to have the family establishment kept up; how long, he could not tell or what to come afterwards he could not foresee, and had not capacity to provide for; and therefore he left it to circumstances.

1. The three children of Thomas are provided for by pecuniary legacies which are a charge upon the whole estate and are to be paid. And they have no further interest in the estate.

2. All the living children of the testator and the representatives of the deceased children are tenants in common of all the real and personal estate with partition postponed until circumstances should make it necessary. The separation of the family, and the death of some, and (496) the sale of the interest of one, thereby letting into the family a new and disturbing element, is such a change of circumstances as make a partition proper. There must, therefore, be a partition of the whole estate, other than the pecuniary legacies to the children of Thomas, into nine equal

shares, giving to each of the testator's living children and the representatives of his deceased children one share, the purchaser of William's share taking his share.

3. There will be an account of the rents and profits. How the rents and profits are to be used and accounted for will more properly be considered when the report comes in. We remark, only generally, that it seems not to have been the intention of the testator that a strict account should be kept while the family were together. Unfair or extravagant advantages will, however, not be allowed.

There is error. This will be certified.

PER CURIAM. Judgment accordingly.

STATE v. R. C. HEIDELBURG, H. D. POTTER and another.

1. The Act of 1868-'69, chap. 178, by which justices of the peace were given jurisdiction finally to try certain petty assaults under certain circumstances, was repealed by the Act of 1870-'71, chap. 43, which says that in all cases of assault the punishment may be by fine or imprisonment, or both, at the discretion of the Court.
2. The Constitution, Art. IV, sec. 33, gives justices jurisdiction of criminal matters arising in their counties when the punishment *cannot* exceed a fine of fifty dollars or imprisonment for one month. When the Legislature removed this limitation and left it discretionary with the Court to exceed that limit, it took away the jurisdiction of justices of the peace over the offense.

INDICTMENT for an affray, tried Fall Term, 1873, Superior Court of GREENE, before *Clarke, Judge.*

(497) The parties had been tried for the same offense before a justice of the peace and fined. To the indictment found in the Superior Court they pleaded "former conviction." His Honor sustained the plea and gave judgment dismissing the charge, from which judgment Solicitor Sherrard appealed.

Attorney-General Hargrove, for the State.
No counsel in this Court for defendants.

RODMAN, J. The defense of a former conviction cannot be sustained. The Act of 1868-'69, chap. 178, subchap. 4, by which justices of the peace were given jurisdiction finally to try certain petty assaults under certain circumstances was indirectly but effectively repealed by the Act of 1870-'71, chap. 43, sec 2, which says that in all cases of assault the punishment may be by fine or imprisonment, or both, at the discretion of the Court.

The Constitution, Art. IV, sec 33, gives justices jurisdiction of criminal matters arising in their counties when the punishment *cannot* exceed a fine of fifty dollars, or imprisonment for one month. The moment, therefore, that the Legislature removed the limitation on the punishment prescribed by the Act of 1868-'69, and left it discretionary with the Court to exceed that limit, it took away the jurisdiction of justices of the peace over the offense.

Our opinion on this point makes it unnecessary to consider the other objections made to the former conviction before a justice. They are, however, equally clear.

PER CURIAM. Judgment reversed and *venire de novo.*

Cited: State v. Jones, 82 N. C., 670; *State v. Watts,* 85 N. C., 518; *State v. Fesperman,* 108 N. C., 772.

S. E. BRATTON v. JOHN ALLISON.

The rule for computing interest on a bond given in South Carolina is to calculate the interest upon the principal for the first year, setting the interest aside, and then for the second, third and so on until the time for the first payment; then calculate the interest on each year's interest to the same time and apply the payment first to the extinguishment of this interest, and the surplus, if any, to a reduction of the principal. If the payment is not sufficient to pay this interest, first extinguish the interest calculated on each year's interest and apply the surplus to the principal interest as far as it will go. If the payment is not enough to satisfy the interest on the interest, it is set aside and neither stops nor bears interest.

MOTION to suspend an execution, and to correct a judgment as to the calculation of interest obtained at the preceding Term, heard by *Logan, Judge,* Fall Term, 1873, of MECKLENBURG Superior Court.

At the Special (July) Term, 1873, the plaintiff obtained a judgment against the defendant upon two notes made in

South Carolina, when it was referred to the Clerk to calculate the interest and enter up the judgment. This the Clerk proceeded to do after the adjournment of the Court, and issued execution for the amount.

After notice the defendant applies to the Judge of the Ninth District to set the execution aside and correct the error. His Honor orders, upon hearing the affidavits filed, that the defendant pay the amount admitted by him to be due to the plaintiff, and that as to the balance it be referred to overhaul the calculation of interest, etc. From this order the defendant appeals.

Wilson & Son, Jones & Johnson and *McCorkle & Bailey,* for appellant.

Vance & Dowd, contra.

READE, J. The rule for the calculation of the interest is to calculate the interest upon the principal (499) for the first year, and set the interest aside. Then calculate the interest upon the principal for the second year just as for the first year, and set that amount aside also. And so on up to the time of the first payment. Then calculate the interest upon each year's interest separately, up to the time of the payment, just as if a bond had been given each year for each year's interest, and the interest calculated upon each of these bonds from its date up to the time of the payment. Then apply the payment to the extinguishment of these interest bonds, and the surplus of the payment apply in part satisfaction of the principal of the original bond. And then pursue the same course from the time of the first to the time of the second payment and so on.

That is the rule when the payment is sufficient to satisfy all the interest bonds. If the payment is not enough to satisfy all the interest bonds, then the payment is to be applied to the interest on the interest bonds, and the surplus to the principal of the interest bonds as far as it will go.

If the payment is not enough to satisfy the interest on the interest bonds, then the payment is set aside, and neither stops interest nor bears interest. And this is fair, because as the interest upon interest does not bear interest, so the payment which is less than that does not bear interest.

There is error in the mode of calculating the interest by the Court below. This will be certified, to the end that the interest may be calculated and the payments applied according to this opinion.

PER CURIAM. Judgment accordingly.

BYNUM, J., did not sit.

A. T. JERKINS, administrator, and others v. D. M. CARTER, administrator of ANN SMITH.

1. **Section 73, chapter 45, Bat. Rev., gives to Clerks of the Superior Courts jurisdiction of debts against the estate of deceased persons.**
2. **A docketed judgment in force against the estate of a decedent has priority of payment over other debts to the extent of the lien which such judgment has on the real estate. If the real estate is more than enough to pay the judgment, then the whole thereof has priority over other debts; if the real estate is only sufficient to pay part of the judgment, then the priority is measured by the value of such real estate.**

CIVIL ACTION, in the nature of a special proceeding, heard and determined by *Clark, Judge,* at chambers in CRAVEN County, 18 April, 1873.

The opinion of the Court contains a full statement of the facts of the case.

From the judgment of his Honor at chambers, affirming the judgment of Probate Judge, the defendant appealed.

Green & Stephenson, for appellant.
Carter, contra.

BYNUM, J. This was a special proceeding before the Clerk, which came here by successive appeals upon the following state of facts: At Spring Term, 1870, the plaintiff obtained judgment against Ann Smith, who dying shortly thereafter, the defendant became her administrator. This proceeding is instituted by the plaintiff in behalf of himself and other creditors, for a settlement of the estate and the payment of his said judgment. The Clerk of the Superior Court took the account and found as a fact that the defendant had in hand assets sufficient to pay the judgment, and the case settled states that the estate is insolvent. Judgment was given by the Clerk, and on appeal, by the Judge for the amount of the plaintiff's debt.

(501) The exceptions of the defendant present two questions: First, had the Clerk the jurisdiction? And second, had the plaintiff, being the only judgment creditor, the right to priority of payment over other creditors?

1. There can be no doubt about the jurisdiction, as it is expressly given to the Clerk by chap. 45, sec. 43, Bat. Rev.

2. The order of payment of the debts of the decedent is regulated by sec. 40, chap. 45, Bat. Rev., which declares that judgments docketed and in force have priority to the extent to which they are a lien on the property of the deceased at his death. The extent of the lien is the amount of the judgment if the land is of greater value, but if the real estate is of less value, the extent of the lien is the value of the land only. Thus, if the value of the real estate is only five hundred dollars, and the personal assets fifteen hundred dollars, and the judgment is for one thousand dollars, the plaintiff would be entitled as a credit, upon his judgment, to five hundred dollars out of the real assets, that is, the value of the real estate, and for the residue of his judgment he would come in *pro rata* with other creditors as to the remaining personal assets.

If there is no real estate, a judgment would give the plaintiff no advantage over other creditors, as it constitutes a lien on real estate only. The law will give him a preference, therefore, not because he has obtained a judgment, but because that judgment is a lien on the real estate, and of course the value of the real estate is the measure of the advantage which his vigilance has secured.

The purpose of the act is to make an equal distribution of an insolvent's estate among his creditors, and this equitable policy can be departed from only to the extent and in the cases provided for in the statute.

We assume from the record and case sent up to this Court that the assets here are the proceeds of the sale of real estate, the plaintiff is therefore entitled to judgment for his debt.

PER CURIAM. Judgment affirmed.

Cited: Murchison v. Williams, 71 N. C., 139.

(502)

G. H. PAUL, to use of JAMES BOYLE, v. D. C. CARPENTER.

1. To take the acknowledgment and private examination of a *feme covert* to a deed conveying her land is a judicial act, and when duly taken, the deed so acknowledged is an assurance of record, like a *fine* in England.
2. An acknowledgment and private examination taken by the provost marshal of the city of New Bern while that place was in possession of the United States military authorities, in the absence of fraud and the like, is good, having a similar effect with foreign judgments.

(*Woodbourne v. Gorrell*, 66 N. C., 82; *Cooke v. Cooke*, 61 N. C., 583; *Boyle v. New Bern*, 64 N. C., 664, cited and approved).

BYNUM, J., dissents.

CIVIL ACTION (for the recovery of real property), tried before *Watts, Judge,* Special (January) Term, 1873, of CRAVEN Superior Court.

The substantial facts as agreed are:

The premises, the subject of the controversy, prior to 17 February, 1864, was the separate property of Hetty, the then wife of A. H. Curtis, since dead, and who since his death has intermarried with the defendant, D. C. Carpenter. On 17 February, 1864, Curtis and wife sold the land for a full and fair price to one Benjamin Jacobs, from whom, through a regular series of conveyances, the plaintiff herein claims, the only question arising being as to the sufficiency in law of the private examination of the *feme* grantor.

No question as to consideration; and it is conceded that the deed to Jacobs was executed freely and without fear, force or undue influence by Curtis and wife, now married to defendant. At the time the parties resided in New Bern, and that town was within the lines and in the possession of the United States army; that no communication existed or was permitted between that place and other portions of the State not within those lines; and that there was no civil authority within those lines competent to take the probate of the deed and the private examination of the (503) *feme covert.* One J. W. Denny, Captain in the United States army, was provost marshal in New Bern at the time, and acting as military judge, with all the power in the premises which the military authorities of the United

States could invest him with. He pretended to take the private examination of Mrs. Curtis, and endorsed the certificate of the same so taken on the deed to Jacobs.

If the Court should hold with the plaintiff, then judgment will be rendered in his favor with sixpence damages and costs; otherwise for the defendant.

His Honor, upon consideration, being of opinion that the plaintiff ought to recover, so adjudged; whereupon defendant appealed.

(504) *Green & Stephenson*, for appellant.

Seymour, contra, submitted the following brief:

1. Under the circumstances of the case the privy examination is good although not taken in the manner required by law.

It is good upon the ground of necessity. The city of New Bern and the surrounding territory were under military occupation. There were no officers competent by the State law to take the examination, and it was illegal for the married woman to go out of the military lines to seek such an officer.

There is no particular sacredness in the privy examination of married women which should exempt it from ordinary rules. It did not exist prior to 18 Edw. I. It was enacted here by Act of 1715.

Its object is to protect, not to hamper, married women. *Barfield v. Combs,* 15 N. C., 514.

Its main beneficence lies in the protection of the *private* examination, and that was observed in this case.

It would be "sticking in the bark" to say that during the military occupation the mere person and office of the official taking it was material.

And it would be a hard measure for an arbitrary (505) rule to deprive of his property a man who had in good faith paid to defendant's wife the money that supported her during the war.

2. The law requiring a private examination before a judicial officer of North Carolina of a married woman was not in force in New Bern from the military occupation until April 2, 1866, the date of the termination of the war, as stated in the case of "The Protector," 12 Wall., 100.

3. The Provost Judge had all the powers in the premises of a Judge of the Superior Court of North Carolina.

In this case it is expressly admitted that the military authorities did appoint a Judge to take the privy (506) examination of married women, who had all the powers that the military of the United States could give him.

That the military authority of the United States is competent to create such a Court must, in view of the recent decisions of the United States Supreme Court, as well as recent State decisions, be considered as settled. *Edwards v. Tanneret,* 12 Wall., 446; *Homdlin v. Wickliff,* 12 *Ib.,* 174; *The Grape Shot,* 9 Wall., 129. The strong authority of these cases can hardly be added to by the State cases, some of which, however, I will cite. *Scott v. Billgony,* 40 Miss., 119; *Rutlige v. Hogg,* 8 Cold. (Tenn.), 554; *Shuter v. Cobb,* 39 Ga., 285; *Griffin v. Cunningham,* 20 Grat., 31.

RODMAN, J. Happily for us, the questions to be dealt with in this case are not of "familiar learning" in our Courts. Probably, the industry of the learned counsel (507) for the plaintiff has referred us to all the authorities which are accessible. But they bear only remotely on the special question in controversy here, and we must decide the case by the aid of a few generally admitted principles, and what seems to be fair and legitimate conclusion from them.

The following doctrines are taken to be generally admitted. When the armies of the United States during the late war took hostile possession of part of the territory of one of the seceding States, it ceased, in legal contemplation, to be a part of the State, during the continuance of the occupation. Nevertheless, the municipal laws for the regulation of the personal relations of the inhabitants, and of their contracts and dealings with each other, continued in force, except when they were expressly suspended by the military authority, or were opposed to the military or political policy of the United States. Dana's note to sec. 346 of Wheaton International Law (4); *Cooke v. Cooke,* 61 N. C., 383; *Boyle v. New Bern,* 64 N. C., 664.

The conquering power might, however, make any new laws that it pleased. The officers of the State were suspended from their functions, and the military authority might appoint others and prescribe their powers and duties. It might establish Courts with such jurisdiction, civil and criminal, as it thought proper to confer. *The Grape Shot,* 9 Wall., 129. In short, *during the continuance of the occupation,* the military power was supreme, not only in fact, but lawfully under the law of nations, subject only to the laws of its own government, the rules of natural justice and equity and the law of nations.

The question then occurs: peace being restored, and the State remitted to her former sovereign rights over the territory, what effect will be allowed to the judgments of such courts, as between the inhabitants? (The Ordinance of October, 1865, and the Act of 1866, chap. 36, are in their terms confined to the acts of officers under the Provisional (508) Government, and do not seem to reach this case).

While the territory thus held ceased temporarily to be a part of the State, it did not become by the mere fact of the belligerent occupation a territory, or part of the United States. The laws of the United States did not act there *proprio vigore;* those applicable to internal commerce did not apply; and the inhabitants were not entitled to the rights and franchises of citizens of the United States. Dana's note to Wheaton, *ante.*

The territory was, legally, foreign territory held by the United States, as much so, as if it had been a part of England or of Mexico, and the courts established were foreign courts. It follows that the effect of their judgments is that which is allowed to foreign judgments; that is, *prima facie,* if not, in the absence of fraud and the like, conclusive evidence of the matters adjudicated. Bigelow on Estoppel, 185, *et seq.; Duchess of Kingston's case,* Smith L. Cases, notes.

To take the acknowledgment and privy examination of a *feme covert* to a deed conveying her land is a judicial act, and when duly taken, the deed is an assurance of record, like a fine in England. *Woodbourne v. Gorrell,* 66 N. C., 82. The record of acknowledgment, etc., does not, of itself, pass the title to the land, or profess to do so; but it adjudicates and records the fact of the wife's free consent to the deed, which thereby becomes complete and passes the title. Hence the law of North Carolina authorizes foreign courts to take such acknowledgment. Rev. Code, chap. 37, secs. 7 and 12, provides that when the husband and wife reside in a foreign country her acknowledgment, etc., may be taken by an ambassador, etc., of the United States, or by the mayor or other chief officer of any city or town. In this case it is agreed by the parties that the Provost Marshal had all the power in the premises which the military authority could confer. *Pro hac vice,* he was the chief officer of the town of New Bern.

Very probably an application of the act cited to a case like this was never anticipated by its authors, but we think it is within the scope and legal intent. No question (509) arises as to the record being only *prima facie* evidence, for the case states that in fact the *feme* did freely consent.

PER CURIAM. Judgment affirmed.

Cited: Jones v. Cohen, 82 N. C., 79; *Varner v. Arnold,* 83 N. C., 210.

THE ATLANTIC, TENNESSEE AND OHIO RAILROAD COMPANY, WILLIAM JOHNSON and others v. S. A. SHARPE and others.

A justice of the peace has no jurisdiction of proceedings of forcible entry and detainer under Rev. Code, chap. 49.

(*Perry v. Tupper, post,* 538, and *State v. Yarborough, ante,* 250, cited and approved).

CIVIL PROCEEDING, under chapter 49, Rev. Code, commenced before a Justice of the Peace, and carried by appeal to the Superior Court of IREDELL County, where it was tried before *Mitchell, Judge,* at Fall Term, 1873, of the Superior Court.

The action is in the nature of a forcible entry and detainer to recover the possession of the property of the plaintiff corporation, alleged to be in the hands of Sharpe, the defendant. It was tried before the Justice and a jury, and the plaintiff put into possession. From this judgment defendants appealed. At the hearing in the Superior Court, the plaintiffs moved to dismiss the appeal, and the defendants moved to dismiss the action. His Honor refused the latter motion of defendants, and allowed the plaintiffs', dismissing the appeal; whereupon defendants appealed to this Court.

Jones & Johnston, McCorkle & Bailey and *R. Barringer,* for appellants.

Armfield and *Caldwell, contra.*

RODMAN, J. Without going into any of the questions attempted to be raised in this case, it will be sufficient (510) to say that we have considered that, as the statute at present stands, a Justice of the Peace has no jurisdiction of a proceeding of forcible entry and detainer, under Rev. Code, chap. 49. *Perry v. Tupper, post*, 538, and *State v. Yarborough, ante,* 250. The reason is that a Justice has no jurisdiction where the title to land comes in question, and by that act the defendants may always raise a question of title under section 5, and in such case the Justice could only dismiss the complaint. As the jurisdiction is a very useful one, the necessity for such a construction is to be regretted. The Legislature may remedy the difficulty, if they shall think fit, by providing that no plea of title shall be put in except under oath; and that in such case the Justice, instead of dismissing the action, shall bind the parties over to the Superior Court, and return his proceedings to that Court.

As the defendants were put out of possession under the invalid proceedings a writ of restitution would be granted, as in *Perry v. Tupper,* but it appears that all the property of the plaintiff corporation has been put in the hands of a receiver, and the order therefore is unnecessary.

PER CURIAM. Action dismissed.

BYNUM, J. did not sit.

Cited: Perry v. Shepherd, 78 N. C., 87.

DAVID MOORE v. W. H. EDMISTON.

The answer of a defendant in an action of slander alleging that he did not speak the words as charged with malice, etc., but that he believed them to be true, stating his reasons for such belief, and further, that he did not admit that the words alleged to be slanderous were spoken within six months of the time of bringing the action, amount, under our liberal system of pleading, to the pleas of justification and the statute of limitation.

CIVIL ACTION (for slander), tried before *Mitchell, Judge,* Fall Term, 1873, of CALDWELL Superior Court.

The plaintiff alleged that the defendant Edmiston, in speaking of a certain affidavit filed by the plaintiff (511) in a suit between him and the defendant, pending in the Superior Court of Caldwell County, at a previous term thereof, had said that "He," meaning the plaintiff, "had sworn to a lie, and I can prove it," etc. Defendant admitted speaking the words in substance, but not in the manner and with the motives charged. Defendant further answered that he did not speak the words from malice and for the purpose of making a false and slanderous charge against the plaintiff, but on the contrary he was informed and believed that the words spoken were true in substance and effect. That the witness, Mary Corperning, summoned on behalf of the plaintiff in the suit referred to in the complaint, concerning whose absence the said affidavit for a continuance was made, was in fact absent from said Court with the leave and consent of the plaintiff, which fact had been communicated to the defendant by the husband of the said Mary, and by others, before the speaking of the words alleged to be slanderous; and further, that when the said affidavit was filed the said husband told the plaintiff that the same was false, inasmuch as he, the said plaintiff, had released and consented to the absence of his wife from the trial. Defendant further answered that he did not admit that the words alleged to be slanderous were spoken within six months before the bringing this suit.

The plaintiff contended that the answer of the defendant did not amount to a plea of justification, and as he had admitted the speaking of the words as charged, and had not denied that the same were spoken within six months, his Honor should compel the defendant to begin first. The Court ruled that the answer did amount to a plea of justification, and that the plaintiff must begin, whereupon plaintiff excepted.

In the course of the trial, and while the plaintiff was being examined as a witness in his own behalf, the counsel for defendant, in cross-examining the plaintiff, asked him "if at the time he made the affidavit mentioned in the pleadings he did not know he could prove the same facts by a (512) witness who was then present that he expected to prove by said Mary Corperning?". And in his re-direct examination he was asked by his own counsel "if before making the affidavit he had not been advised by his counsel that the evidence of the said Mary Corperning was important in that suit?" This question was objected to on the ground that the counsel was then present and was a competent witness. His Honor sustained the objection. Plaintiff excepted, and the counsel was examined touching the fact alluded to.

The plaintiff's counsel asked, in writing, his Honor to charge—

1. That the answer of defendant does not amount to a plea of justification.

2. That if the jury believe that the words alleged in the complaint were spoken by the defendant within six months from the bringing this action, the plaintiff would be entitled to nominal damages at law.

3. That as the defendant has not pleaded justification, the evidence of the defendant can only be considered by the jury in mitigation of damages, and not as matter of justification, *provided* the jury believe the words alleged in the complaint were spoken in six months.

His Honor refused to give any of the instructions prayed for, and charged the jury that the defendant had pleaded justification, and it was for them to say whether he had sustained it by his proof.

Verdict for defendant. Rule for a new trial, rule discharged. Judgment, and appeal by plaintiff.

Armfield and *Folk,* for appellant.

Malone & Bynum (with whom were *McCorkle & Bailey*), for defendant.

BYNUM, J. The subtle science of pleading heretofore in use is not merely relaxed but abolished by the Code, and the forms of pleading in civil actions, and the (518) rules by which their sufficiency is to be determined, are those prescribed in The Code. C. C. P., sec. 91. The new system thus inaugurated is such that few, if any, of the ancient rules are now applicable.

All that is required of the plaintiff is a plain and concise statement of the facts constituting the cause of action, and of the defendant a general or specific denial of each material allegation of the complaint not controverted in the answer. Section 100.

In order that all technical objections may be (519) avoided, and the parties brought to a speedy trial upon the merits, section 119 provides that the allegations of each pleading shall be liberally construed with a view to substantial justice between the parties. But to obviate all diverse constructions which the ingenuity of counsel at the trial might give to the pleadings, to the embarrassment of Court and jury and the delay and obstruction of the course of justice, section 120 provides that when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the Court may require the pleading to be made definite and certain by amendment. Sections 128-136 point out how amendments shall be made, the obvious purpose being that parties shall apply to the Court, in apt time, prior to the trial, to amend the pleadings in all the particulars objected to, and that they may not be allowed, at the trial, to spring objections to the form or effect of the charge or defense.

So intent were the framers of The Code to discard all technical forms, that by section 135 it is declared that "the Court and the Judge thereof *shall,* in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." And then, by a sweeping curative supplement to this most liberal system of pleading, section 132 confers upon the Court the power, both before and after judgment, to make almost any conceivable amendment so as to conform the pleadings to the facts proved.

Applying to the case before us these new rules of pleading, we conclude that the pleadings and the issues made by them were so reasonably certain and understood by the parties that their substantial rights were tried. That according to The Code the answer of the defendant amounted to the plea of justification and of the statute of limitations.

If the exceptions taken and so ably argued by the counsel of the plaintiff were to be decided according to the intri-
(520) cate system of pleading in the books, we might concur
in the reasoning and authorities adduced, but we hold that they have no application here for the reasons before stated.

This disposes of all the exceptions argued in this Court; the one as to the question to the plaintiff we understand to have been abandoned properly.

There is no error.

Per Curiam. Judgment affirmed.

Cited: Gorman v. Bellamy, 82 N. C., 499; *Knowles v. R. R.,* 102 N. C., 65; *Stokes v. Taylor,* 104 N. C., 397; *Fulps v. Mock,* 108 N. C., 605; *Wester v. Bailey,* 118 N. C., 194; *Wilson v. Brown,* 134 N. C., 407.

MICHAEL BULLINGER v. GABRIEL MARSHALL.

1. A plaintiff who as a witness relates a conversation he had with the defendant, which is by the defendant contradicted in a material particular, can corroborate his testimony by showing by another witness that he made substantially the same statement to that witness, soon after the conversation occurred, as he made on the trial.

2. An action for deceit in the sale of a mule—an action *ex delicto* under the old system—is not within the jurisdiction of a justice of the peace, as provided in Art. IV, sec. 33, of the Constitution.

3. The Court, during the trial, took a recess, when the jury separated and dispersed, the defendant not objecting nor his Honor charging them not to do so nor cautioning them against conversing with any one concerning the pending case: *Held* to be no ground for a new trial.

4. *Held further*, that the defendant being disappointed by a witness who told him the day before the trial that he (the witness) would, if examined, give him (the defendant) a good character, and which the witness did not do, is not such a surprise as will entitle the defendant to a new trial.

(*Frœlich v. Express Co.*, 67 N. C., cited and approved).

CIVIL ACTION, for deceit in the sale of a mule, tried before *Henry, Judge,* Spring Term, 1873, of BURKE Superior Court. (521)

On the trial, the plaintiff, as a witness in his own behalf, stated that at the time of making the trade for the mule the defendant told him the mule was "sound as far as he knew"; but did not tell him the mule had had the sweeney and was then well. Plaintiff further stated that he drove the mule to South Carolina; that it limped on the way when traveling over hard ground or when ridden.

The plaintiff detailed a second conversation had with the defendant, after the defendant had sold the mule in South Carolina and returned to his home in Catawba County, in which defendant said that the mule was "sound as far as he knew then" (meaning at the time of the sale), and adding, "of course it had had the sweeney."

Defendant, as a witness, stated that he told the plaintiff in the first conversation, at the time of making the trade that the mule was "sound as far as he knew then, but that it had had the sweeney."

The plaintiff then offered to prove by another witness that on the same day, and soon after the second conversation took place, he, the plaintiff, repeated in detail to the witness both of said conversations, with an account of attendant circumstances, and that the statement made by plaintiff at that time was substantially the same as that given by the plaintiff on the trial. To this the defendant objected, on the ground that the admission of such testimony was in effect allowing the plaintiff to manufacture evidence. His Honor overruled the objection and admitted the testimony. Defendant excepted.

For the defendant, other evidence was admitted, tending to show that the mule was sound at the time of sale and afterwards; and also on the part of the plaintiff showing the contrary.

When his Honor, about the close of his charge to the jury, asked the counsel if they desired any particular instructions, the defendant moved that the plaintiff be *nonsuited,* on the ground that the damages demanded in the complaint were only one hundred dollars, and therefore the suit (522) should have been brought in a Justice's Court. Motion refused.

There was a verdict for the plaintiff, whereupon the defendant moved for a new trial, for the reason: That during the progress of the trial, before the testimony was closed, the Court took a recess for dinner; that during said recess the jury separated and dispersed, as had been usual during the term of the Court, and talked with persons not of the jury. There was no evidence that the jury conversed with any one in relation to the pending trial. One of the jury was in the sheriff's office, and that while there a conversation occurred between other persons, not of the jury, but what was said did not appear, nor did the conversation influence the juror, who happened to be there on other business. Nor did it appear from the affidavits that the minds of any one of the jury were influenced or prejudiced by what they heard, or that there was any attempt to do so on the part of any one.

As another ground for a new trial the defendant alleged surprise, concerning which his Honor found the following facts: One William Aiken, who was sworn, went to defendant the day before the trial and told him if he, Aiken, was introduced as a witness he would give him, the defendant, a good character; that Aiken was examined on the trial, and testified that the defendant was a "sharper," and would take any advantage in a trade. Aiken was in attendance on the Court as plaintiff's witness. Defendant, when examined, said nothing of his interview with Aiken.

The motion for a new trial was overruled by the Court, and the defendant appealed.

Armfield, for appellant.
Folk, with whom were *Busbee & Busbee, contra.*

PEARSON, C. J. First, the plaintiff was introduced (524) as a witness in his own behalf, and swore that at the time of the sale the defendant said: "The mule was sound as far as he knew," but did not tell him *"the mule had had the sweeney."*

Here was a direct contradiction. The plaintiff, by way of corroborating his testimony, was allowed to prove that soon after the sale and after the unsoundness of the mule had become apparent, the plaintiff, in a conversation with the witness, in detailing the circumstances of the (525) trade, told him that the defendant had not disclosed the fact "that the mule had had the sweeney."

We concur with his Honor in the opinion that this testimony was admissible. Before the late statute, by which parties to an action are made competent as witnesses, it was a settled rule of evidence that when a *witness* was impeached he might be corroborated by proving that soon after the matter occurred he had made the same statement in regard to it. When a party was allowed to be a witness, it followed as a logical sequence, if his testimony be impeached, he may be corroborated by showing that he had, soon after the matter occurred, "made the same statement in regard to it." Why should not this consequence follow? No answer can be given; on the contrary, it is in conformity to the avowed policy of the statute by which rejection of testimony on the ground of incompetency is ignored, and the testimony is to be admitted and *weighed by the jury in the scale of credibility.* We yield to the force of this change in the law of evidence, but have no right to express an opinion as to its wisdom, and have only to carry out its corrolaries.

2. The action demands damages for a deceit in the sale of a mule and the allegation made out a cause of action which, by the former mode of procedure, would have been classed under *"actions ex delicto,"* as distinguished from *"actions ex contractu."* At the trial it was moved on the part of the defendant to nonsuit the plaintiff on the ground that the action ought to have been commenced before a Justice of the Peace as the damages demanded are *only* one hundred dollars.

The Constitution ordains, Art. IV., sec. 23, "The several Justices of the Peace shall have exclusive original jurisdiction of all civil actions founded on contract wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy."

According to our construction of this section a Justice of the Peace has not jurisdiction in "actions *ex delicto,"* (526) although the cause of action may grow out of a contract. It being in form under the old mode of procedure, an action *ex delicto* proves that it is not founded on the contract, but is collateral thereto. There are cases where a party is allowed to waive the tort and sue in contract, as if one takes my horse and sells it and *receives the money,* I may waive the tort and sue for "money had and received to my use," and if the sum does not exceed two hundred dollars the jurisdiction belongs to a Justice of the Peace; but if the money be not *received,* my remedy is for the tort, and a Justice of the Peace has not jurisdiction. So if there be a warranty of soundness in the sale of a horse, the vendee may sue upon the contract of warranty and a Justice of the Peace has jurisdiction, or he may declare in tort for a false warranty and add a count in deceit (see Williams' notes to Sanders' Reports), in which case a Justice of the Peace has not jurisdiction—the plaintiff being permitted to declare *collaterally* in tort for a false warranty, in order to enable him to give in a count for the deceit, which of course was in tort.

Our conclusion is that the effect of this section of the Constitution is to enlarge the jurisdiction of a Justice of the Peace by raising the amount to the sum of two hundred dollars, and by extending it to cases *founded on contract* for *unliquidated damages,* as in cases of a breach of warranty of soundness and other like instances, but that the jurisdiction does not extend to any matter collateral, although it grew out of the contract, for in such case the action is not founded on the contract. See *Frœlich v. Express Co.,* 67 N. C., 1.

3. In considering this question, we are confined to "the case" made up and signed by the counsel of the plaintiff and of the defendant, according to C. C. P. The other papers by which the file is uselessly encumbered not made a part of the statement are put out of the case.

The ground of the motion for a new trial was that when Court took a recess for dinner the jurors separated and each man went off and got his dinner, and that "his Honor gave the jurors no caution in regard to conversing with persons not of their number about the case, nor did his (527) Honor give the jury permission to separate or ask the consent of counsel that the jury might be allowed to do so."

His Honor, upon hearing the affidavits and arguments, refused to grant a new trial, and, on the facts set out we can see no reason to differ with him; the separation of the jury was before "the charge of the Judge," and it is the usual practice for juries in civil cases to separate during recess, either for dinner or for the night, unless such separation be objected to by one of the parties. The defendant knew of the separation of the jury, and if he objected to it in all fairness he should have done so *before the verdict was rendered.*

4. Motion for a new trial on the ground that the defendant was "surprised" by the testimony of William Aiken and "read the affidavit of *the defendant,* herewith sent as a part of this case." So we are to take the several matters set out in the affidavit *as facts* agreed on; that is to say, Aiken, for the purpose of entrapping the defendant, told him that he would swear that the defendant's general character was good, and when called by him as a witness swore that his (the defendant's) general character was bad. Taking this to be so, it proves that the defendant was deceived by Aiken, but it does not show that the defendant was *surprised* in the sense given to the word "surprise" by the authorities.

In order to justify the legal inference that the defendant was taken by surprise two additional facts are necessary:

1. That the defendant was a stranger in the land and had no other acquaintance present by whom his general character could be proven, for although a man is not supposed to be at all times prepared to explain every particular incident of

his life, yet he is presumed to be able to prove a good general character unless he happens to be among strangers.

2. There is no averment in the affidavit that the defendant would be able to prove a good general character at another trial.

Why grant a new trial on the ground of surprise, (528) unless the affidavit discloses matter showing reason to believe that upon the second trial the case will be materially changed?

This Court is reluctant to interfere with the ruling of the Judge in the Court below upon matters calling for the exercise of a sound discretion, unless error in the legal inference is apparent.

PER CURIAM. Judgment affirmed.

Cited: State v. Ricketts, 74 N. C., 192; *Nance v. R. R.,* 76 N. C., 10; *Roberts v. Roberts,* 82 N. C., 32; *McDonald v. Cannon, Id.,* 247; *McLeod v. Bullard,* 84 N. C., 529; *State v. Efler,* 85 N. C., 589; *Ashe v. Gray,* 88 N. C., 192; *Harvey v. Hambright,* 98 N. C., 447; *Long v. Fields,* 104 N. C., 224; *Asher v. Reizenstein,* 105 N. C., 217; *Bowers v. R. R.,* 107 N. C., 722; *Land Co. v. Brooks,* 109 N. C., 700; *Sprague v. Bond,* 113 N. C., 554; *Wallace v. Grizzard,* 114 N. C., 493; *Burnett v. R. R.,* 120 N. C., 517; *Hobbs v. Bland,* 124 N. C., 287.

JOHN BARDEN v. DANIEL SOUTHERLAND.

A bond signed by the defendant before the name of the obligee or the amount thereof is inserted is not the deed of the defendant and cannot be recovered, although several payments have been made thereon.

(*Bland v. O'Hagan*, 64 N. C., 471, cited and approved).

CIVIL ACTION, commenced in a Justice's Court, and carried by appeal to the Superior Court of DUPLIN County, where it was tried before *Clark, Judge*, Spring Term, 1873.

The plaintiff as assignee, brings his suit on the following bond:

"$300. One day after date, we or either of us promise to pay Wells Boney or bearer three hundred dollars for value received.

"SOUTHERLAND & BLACK, [Seal.]
"DANIEL SOUTHERLAND, [Seal.]
"D. HOWELL. [Seal.]

"26 August, 1852."

On this note or bond were endorsed the following payments:

"Received on the within note seventy-five dollars.
"14 October, 1856. WELLS BONEY."

"Received on the within note one hundred dollars. (529) 17 February, 1859."

"Received on the within note one hundred dollars. 7 July, 1859."

Also the name of "L. A. Merriman" as endorser.

The above bond was signed and sealed by the defendant, the name of the obligee, "Wells Boney," and of the sum of "three hundred dollars," being blank, as the surety of Southerland & Black, at the solicitation of the senior member of that firm, and it was taken by said Southerland, of the firm of Southerland & Black, so signed, to Wells Boney, and after agreement with him as to the sum, etc., the name of Wells Boney was inserted as obligee, and the words "three hundred dollars," as the sum in said bond, filled up and delivered to the said Wells Boney, who gave the money upon it. The defendant was not present, nor did he see said bond, or do any act relating thereto after signing and delivering the said bond until just prior to the commencement of this action, when the plaintiff demanded payment and was refused.

The payments were made as endorsed. The bond was passed by the obligee, Wells Boney, just prior to the beginning of this action, to L. A. Merriman for value, and by him endorsed to the plaintiff. The defendant pleads that the bond is not his bond; that having signed and sealed it when there was no obligee, nor sum mentioned, which were inserted after the signing and sealing and in his absence, that the same is void.

There was a judgment for defendant in the Justice's Court. In the Superior Court the judgment was reversed, and the defendant appealed.

No counsel in this Court for appellant.
Allen and *Smith & Strong, contra.*

RODMAN, J. This case so closely resembles *Bland v. O'-Hagan,* 64 N. C., 471, in all material respects that (530) the reasons given there may be taken as for the reasons of our decision now. The bond is not the deed of the defendant.

It may be that when the Legislature made bonds negotiable it would have been well if the Courts had interpreted the act as putting them in all respects on the footing of promissory notes. They did not do so, but continued to regard them in all respects, except so far as they were directly affected by the act, as instruments under seal, requiring delivery to a certain obligee, etc. We do not feel at liberty to reverse so long a series of decisions, because we could not do so without injury to those who have acted upon the presumption that they declared the law. If any change is desirable it must come from the Legislature.

PER CURIAM. Judgment below reversed, and judgment for defendant.

STATE v. RIDDICK BAKER.

In an indictment containing two counts—one for larceny and the other for receiving stolen goods—the jury may bring in a general verdict of guilty, the grade of punishment being the same for each offense.

(*State v. Speight,* 69 N. C., cited and approved, and *State v. Worthington,* 64 N. C., 594, cited and distinguished from this).

INDICTMENT, charging the defendant with larceny and receiving stolen goods, tried before his Honor *Judge Clarke,* Fall Term, 1873, Superior Court of WILSON.

The jury found the defendant guilty generally, on the trial of the indictment, which contained two counts, one for stealing and the other for receiving stolen goods. Defendant moved for an arrest of judgment because the verdict was too general, it being "inconsistent and absurd" to find the defendant guilty of stealing certain property, and at (531) the same time guilty of receiving such property, knowing it to be stolen. No judgment could be given on such verdict.

His Honor refused the motion and gave judgment against the defendant, from which judgment he appealed.

Faircloth & Granger, for appellant, cited and relied on the case of *State v. Worthington,* 64 N. C., 594.

Attorney-General Hargrove, for the State, cited sec. 23, chap. 35, Rev. Code, which provides for the joinder of the two counts as contained in the indictment under review; also *State v. Speight,* 69 N. C., 72, in which a general verdict of guilty upon a similar indictment was upheld.

PEARSON, C. J. On the argument it was conceded by the counsel of the defendant that *State v. Speight,* 69 N. C., 72, was decisive against him. It is there said: "It may be that the prisoner stole the spirits of turpentine, or received the spirits of turpentine, knowing it to have been stolen. The grade of offense and the punishment are the same, and the joinder of the two counts is *allowed by statute* because of the difficulty of proving whether the prisoner stole the thing himself or got some one else to steal it for him, or received it from some person knowing it to have been stolen; and it is decided that by force of statute, upon an indictment charging the prisoner with stealing the article in one count, or with receiving the article, knowing it to have been stolen, in another count, judgment may be rendered upon a general verdict finding the defendant guilty in manner and form as charged."

It will be noted the decision is put upon the effect of the statute, and no reference is made to the remarks in *State v. Worthington,* 64 N. C., 594: "Where several counts in an indictment set out different ways in which the crime was committed the jury need not find in which of the ways it was committed, but may find a general verdict; but when the (532) indictment charges *two distinct offenses* of different grades and of such a nature that if the defendant be guilty of one he cannot be guilty of the other no judgment can be rendered on a general verdict. These difficulties are all put out of the way by amendment."

The remarks in this case refer to the common law, and no reference is made to the statute by which the offenses are put on the same grade.

This will seem to reconcile the two cases, or rather to show that the discrepancy happened because in the first case the remark was made as if the matter was at common law without adverting to the statute by which the distinction is removed.

No error. This will be certified.

PER CURIAM. Judgment affirmed.

Cited: State v. Lawrence, 81 N. C., 526; *State v. Morrison,* 85 N. C., 563; *State v. Carter,* 113 N. C., 640.

C. F. LOWE and wife and others v. THE BOARD OF COMMISSIONERS OF DAVIDSON COUNTY.

When the dissolution of an injunction would be equivalent to a dismissal of the action, if a reasonable doubt exists in the mind of the Court whether the equity of the complaint be sufficiently negatived by the answer, the Court will not dissolve the injunction, but continue it to the hearing.

(*James v. Lemley*, 37 N. C., 278; *Miller v. Washburne*, 38 N. C., cited and approved).

CIVIL ACTION, motion to dissolve an injunction, heard by *Cloud, Judge,* Spring Term, 1873, of DAVIDSON Superior Court.

Upon the application of the plaintiffs to his Honor *Judge Cloud,* at chambers, an injunction issued to defendants on 22 April, 1873, restraining them from selling certain lots belonging to the county, situate in the town of Lexington, and which the board had ordered to be sold for certain purposes.

The defendants, after due notice, moved on 5 May following to vacate the order of injunction, which motion his Honor refused and continued the restraining order to the hearing. From this decision of his Honor, defendants appealed.

McCorkle, for appellants.
Bailey, contra.

BYNUM, J. The injunctive relief sought in this action is not auxiliary to another and main relief but is the main relief itself, and the object of the action, therefore, the dissolution of the injunction, would be equivalent to a dismissal of the action. In such cases where a reasonable doubt exists in the mind of the Court whether the equity of the complaint is sufficiently negatived by the answer, the Court will not dissolve the injunction but continue to the hearing. Much must depend upon the sound discretion of the Court to whom the question of dissolution is preferred. *James v. Lemley,* 37 N. C., 278; *Miller v. Washburne,* 38 N. C., 161. In this case the answer does not remove such reasonable doubt, created by the complaint and affidavit, without which removal, according to the principles of this Court, the injunction ought not to be dissolved before the hearing. The novel and important question raised by the pleadings and ably discussed before us do not come up for decision now.

PER CURIAM. Judgment affirmed.

Cited: Marshall v. Comrs., 89 N. C., 107; *Jones v. Buxton,* 121 N. C., 286; *Vickers v. Durham,* 132 N. C., 882; *Solomon v. Sewerage Co.,* 133 N. C., 150.

(534)

E. T. CLEMMONS v. E. D. HAMPTON and W. B. MARCH.

1. In an action for the possession of personal property, under section 176, C. C. P., a third party claiming such property loses his right to be made a party to the suit after a lapse of three years from the filing his affidavit and his motion to allow him to interplead.
2. Whether such claimant can appeal from an order of the presiding Judge refusing his application to be made a party—*Quere.*

CIVIL ACTION, for claim and delivery of personal property, tried before *Cloud, Judge,* Spring Term, 1873, of STOKES Superior Court, to which it had been removed from Forsyth Superior Court.

A third party, W. B. Hampton, applied to be made a party defendant, which application his Honor refused on the ground that he had lost such right by his own laches. From the order refusing the motion W. B. Hampton appealed.

The facts pertinent to the point decided are stated in the opinion of the Court.

T. J. Wilson and *Gray,* for appellant.
Scales & Scales and *McCorkle & Bailey, contra.*

RODMAN, J. This was an action to recover three stage coaches, eight horses, and eight sets of harness.

The plaintiff claimed and obtained the immediate delivery by proceedings under sec. 176, *et seq.,* of C. C. P. The summons was returnable to Spring Term, 1870, of Forsyth Superior Court. In April, 1870, W. B. Hampton (not the original defendant Hampton) made affidavit that two of the coaches and one of the horses claimed by the plaintiff were his property and served a copy on the sheriff under sec. 186, C. C. P.

March, one of the defendants, disclaimed title to the property, and afterwards Ephriam Hampton, the other defendant, became bankrupt. At Spring Term, 1873, W. B. Hampton moved, under sec. 65, C. C. P., to be made (535) a party to the action. The Judge refused the application, and W. B. Hampton appealed.

We think it at least doubtful whether W. B. Hampton had a right to appeal from such refusal. But conceding, for the sake of the argument only, that he had, we concur with the Judge that he had lost his right to be made a party by his laches.

Section 186, C. C. P., is intended only for the benefit of the sheriff, and to enable him to protect himself against the claim of the third party, by taking from the plaintiff an indemnity against such claim, before he delivers the property to him. It does not amount, on the part of the third claimant, to becoming a party to the action, it is not a necessary step in that direction, and the third claimant may become a party under sec. 65, without having made and served such affidavit. By the failure to do so, he would have lost his right to sue the sheriff for the trespass, but on becoming a party might obtain judgment against the plaintiff for restitution. W. B. Hampton was entitled to become a party if he had applied in reasonable time. But he has waited for more than three years after the seizure, until his claim appears at least to be barred by the statute of limitations, and he shows no excuse for the delay. We concur with the Judge below that he has waived his right by the delay.

PER CURIAM. Judgment affirmed.

Cited: Sims v. Goettle, 82 N. C., 272.

(536)

WESLEY MAYFIELD v. ALEXANDER JONES.

When, in his complaint, the plaintiff demands unliquidated damages, there must be an enquiry to ascertain the amount thereof.

CIVIL ACTION, for the recovery of the value of a mule, tried before *Watts, Judge,* Fall Term, 1873, GRANVILLE Superior Court.

The plaintiff alleges that the defendant converted to his own use a mule belonging to him of the value of $200. Defendant answers with a general denial.

At Fall Term, 1873, the Court required the defendant to give additional security or justify on or before the second day of the next term. This the defendant failing to do, the plaintiff moved for and obtained judgment against him for $200; from which judgment defendant appealed.

Batchelor, Edwards & Batchelor, for appellant.
Attorney-General Hargrove, contra.

PEARSON, C. J. The complaint demands $200 for the wrongful conversion of a mule. In some way or other, not apparent upon the face of the record, the defendant is made to give bond and security "for the defense of said suit," and after many continuances, upon a rule to justify the former bond or give additional security, there is judgment that the plaintiff recover the sum of $200 and cost of suit according to his complaint.

The demand was for unliquidated damages, and considering it as a judgment by default there ought to have been an inquiry as to the amount of the damages.

There is error. Judgment reversed. This will be certified, to the end that the pleading may be amended so that the record may show whether the plaintiff sues for the note as in detinue or replevin or sues for damages as in trespass or trover.

PER CURIAM. Judgment reversed.

Cited: Wynne v. Prairie, 86 N. C., 77; *Rogers v. Moore, Id.,* 87.

H. C. WALL and others v. HENRY FAIRLEY and others.

The presiding Judge, on a trial in the Court below, has the power in his discretion to allow or refuse amendments to the pleadings.

(*Robinson v. Willoughby,* 67 N. C., 84, cited and approved).

MOTION by plaintiffs to amend the pleadings, heard at Spring Term, 1873, before *Buxton, Judge,* in Superior Court of RICHMOND.

The amendment asked consisted in substituting an amended complaint in lieu of the original, which the counsel represented to his Honor had been filed under a misapprehension of the facts of the case, the true state of which had come to light since the original was filed.

The Court allowed the amendment, from which order defendants appealed.

W. McL. McKay and *McNeill,* for appellant.
Battle & Son, contra.

READE, J. The power of the Court below to allow the amendment is the only question. And about that there is no doubt. The case of *Robinson v. Willoughby,* 67 N. C., 84, is decidedly in point in favor of the power.

There is no error. This will be certified.

PER CURIAM. Order affirmed.

(538)

GIDEON PERRY and others v. H. M. TUPPER.

Whenever a party is put out of possession by process of law, and the proceedings are adjudged void, an order for a writ of restitution is a part of the judgment, and should be made.

(*Watson v. Trustees,* 47 N. C., 212; *Dulin v. Howard,* 66 N. C., 433; *Mitchell v. Flemming,* 25 N. C., 128, cited and approved).

CIVIL ACTION, commenced in a Justice's Court to recover the possession of a certain house and lot, tried before *Watts, Judge,* January Term, 1874, of WAKE Superior Court.

Upon the hearing the defendant's counsel moved to quash the proceedings and for a writ of restitution of the land, of which the plaintiffs had obtained possession under a writ of possession issued between the time when the appeal was prayed and the appeal bond given—the morning thereafter—on the ground of the want of jurisdiction of the Justice.

The plaintiff made no resistance to the motion to quash which was granted by the Judge, but resisted the motion for an order for a writ of restitution and proposed to show that plaintiff had title to the land and the defendant was a trespasser. The defendant insisted that he was entitled to the writ and that the evidence offered was inadmissible.

The Court was of opinion that the issuing of the writ was within the discretion of the Court, and in exercising that declined to grant the motion for restitution. From this refusal the defendant appealed.

Fowle and *Lewis,* for the plaintiff.
Smith & Strong and *Rogers,* for the defendant.

PEARSON, C. J. Whenever a party is put out of possession by process of law, and the proceedings are adjudged void, an order for a writ of restitution is a part of the judgment.

Mr. Fowle says: "The affidavit on which the summons issued states that the defendant entered as a tres- (539) passer, and the motion to quash for want of jurisdiction admits the fact that the defendant is a trespasser. Will the Court countenance a trespasser by restoring the possession to him?"

Reply. The proceeding is not simply void for some irregularity, but was void *ab initio* for the want of jurisdiction;

so the plaintiffs get into possession by an abuse of the process of the law. Can the Court countenance an abuse of the process of the law by permitting the plaintiffs to retain the fruit of their wrongful act? The only mode to prevent such abuses of judicial process is to put the parties in *statu quo.*

In *The King v. Wilson,* 3 Adol. & Ell., 817, 30 Eng., C. L. Rep., 228, it is said by the Court: "It has been said that the Court will not do this (that is, order a writ of restitution) unless the party unlawfully dispossessed should appear to have title to the premises; a most inconvenient inquiry upon affidavits, and a course full of danger to the public peace as protecting the executing of an unlawful sentence."

In *Watson v. Trustees,* 47 N. C., 212, the Court say: "We are satisfied that the general rule has been to grant the writ of restitution upon quashing the proceedings on a conviction under the statute of Forcible Entry and Detainer." And the Court, inasmuch as "the writ is not demandable, *ex rigore juris,*" under the very peculiar circumstances of the case brought to the notice of the Court by the finding of the inquisition, and the petition of the defendant for the writ of *recordari,* held that the Judge in the Court below ought to have refused to order the writ of restitution.

In *Mitchell v. Fleming,* 25 N. C., 128, the proceedings being quashed, the writ of restitution was ordered as a matter of course.

In our case, without giving any reason, or finding any fact, and without evidence, the Judge says *"ecce volo,"* and refuses to make an ordinary part of the judgment quashing the proceedings.

The error is too palpable to admit of discussion. (540) *Dulin v. Howard,* 66 N. C., 433.

Judgment reversed. This will be certified, to the end that a writ of restitution may issue.

PER CURIAM. Judgment reversed.

Cited: State v. Yarborough, ante, 253; *R. R. v. Johnston, ante,* 340; *R. R. v. Sharpe, ante,* 510; *Perry v. Tupper,* 71 N. C., 380; *McMillan v. Love,* 72 N. C., 19; *Heath v. Bishop, Id.,* 457; *Perry v. Shepherd,* 78 N. C., 87; *Lane v. Morton,* 81 N. C., 41; *Manix v. Howard,* 82 N. C., 129; *Meroney v. Wright,* 84 N. C., 339; *Devries v. Summit,* 86

N. C., 134; *Cottingham v. McKay, Id.,* 244; *Boyett v. Vaughan, Id.,* 726; *Noville v. Dew,* 94 N. C., 47; *Lytle v. Lytle, Id.,* 525; *R. R. v. R. R.,* 108 N. C., 306; *Robinson v. McDowell,* 125 N. C., 344.

ANDERSON KIRBY v. M. MASTEN, Sheriff, and others.

The acts and declarations of a vendor while in possession of the property sold are competent both to prove the fact of possession and control, and to qualify the extent and purpose of the possession.

CIVIL ACTION, trover under the former system, tried at Spring Term, 1873, of FORSYTH Superior Court, before *Cloud, Judge.*

The appeal was taken by defendant, for alleged error on the part of his Honor in admitting certain evidence. All the facts necessary to an understanding of the point decided are stated in the opinion of the Court.

T. J. Wilson, Masten, Scales & Scales and *Gray,* for appellants.

McCorkle & Bailey, contra.

RODMAN, J. This was an action of trover begun in February, 1868, for the conversion of certain personal property, sold by the defendant Masten, as sheriff, on 12 February, 1868, under executions upon Justice's judgment against Isaac Lester.

The plaintiff claimed under a sale to him by Lester of 25 January, 1868, and a bill of sale of 29 January, 1868. The defense was that the sale was fraudulent as to the creditors of Lester.

(541) The jury, under the charge of the Judge, found a verdict for the defendants.

The only exceptions are by the plaintiff by reason of the admission of certain evidence.

The evidence objected to and received was all of the same general character, and the same principle applies to all of it.

It consisted of acts and declarations of Lester, after his sale to plaintiff and before the sale by the sheriff, upon and with respect to the property in question, done and made in the absence of the plaintiff, but while Lester was in the possession and control of the property with the knowledge and acquiescence of the plaintiff. It is certainly the general law that the acts and declarations of a vendor after the sale, and after he has parted with the possession of property, are not evidence against his vendee to prove the sale fraudulent.

It is equally clear that possession held by the vendor after the sale, with the consent or acquiescence of the vendee, is evidence more or less strong, according to the circumstances, that the sale was fraudulent. Twine's case, 1 Smith's L. C., 2, notes.

This being so, it must follow that the acts and declarations of the vendor while in possession are competent both to prove the fact of possession and control and to qualify the extent and purpose of the possession. They are part of the *res gestæ*. The plaintiff cannot justly complain of this, because having left the vendor in possession he has left it a question whether the possession was retained by the vendor for his own benefit or not, which must be determined by the circumstances of which the acts and declarations of the vendor respecting the property are part.

We concur with the Judge that the evidence was competent.

PER CURIAM. Judgment affirmed.

Cited: Yates v. Yates, 76 N. C., 147; *Gidney v. Logan,* 79 N. C., 217; *Hilliard v. Phillips,* 81 N. C., 104; *Nelson v. Whitfield,* 82 N. C., 51; *Gadsby v. Dyer,* 91 N. C., 315; *Shaffer v. Gaynor,* 117 N. C., 24.

(542)

STENHOUSE, McCAULEY & CO. v. CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

1. Evidence of what an agent said in regard to a transaction already passed, but while his agency for similar objects still continued, is not admissible to prove the contract itself, although it is competent to contradict the statement of the agent that no such contract was made.

2. If such evidence is, after objection, received generally, without confining it to the contradiction of the statement of the agent, it is error, and entitles the party objecting to its reception to a new trial.

(*McComb v. Railroad, ante,* 178, cited and approved).

CIVIL ACTION upon an alleged contract to transport cotton, tried before *Moore, Judge* (Special), July Term, 1873, Superior Court of MECKLENBURG.

One of the plaintiffs testified that in September, 1870, he made a contract with one W. W. Pegram, who was then acting as the local agent of defendant at the depot in Charlotte for the reception and transportation of cotton at that place for New York, at the rate of $2.78 per bale from Charlotte via Charleston to New York, from that time to 1 January, 1871. The plaintiffs were cotton buyers and in pursuance of the contract delivered to defendants 592 bales of cotton which were shipped at that rate. That on 11 October, plaintiffs were notified by said agent that the defendants refused to carry any more at that rate, and claimed the right to do so because no such alleged contract had been made. That plaintiffs offered to deliver cotton to defendants after the refusal for shipment to New York, and were ready to fulfill the contract on their part, but defendants refused to receive and ship the same. That from 11 October, 1870, to 1 January, 1871, plaintiffs bought and shipped to New York over other railroad routes 3,528 bales of cotton, 611 of which they had to pay at the rate of $3.50 per bale.

Pegram, the agent, testified that he made no such contract as above stated, and had no authority as agent (543) to make any such contract as testified to by the plaintiff; that on 28 September, 1870, he showed one of the plaintiffs a telegraphic dispatch, of which the following is a copy, viz.:

"CHARLESTON, 28 Sept., 1870.

"*W. W. Pegram*:—We will maintain those rates until 1 January unless you can do better.

"E. H. BARNWELL."

That on the 27th of said month the witness had telegraphed to said Barnwell to know if the railroad and the shipping line from Charleston to New York would co-operate with defendants in conveying cotton from Charlotte to New York for $3 per bale; that he informed the plaintiff of the contents of both dispatches and offered to contract with him for the carrying of his cotton upon those terms, which proposal he refused to accept. That the only authority he had to make any contract for the carrying of cotton to New York was what was contained in said telegram and certain letters which, as the case was decided on another point, are unnecessary to set out. This witness, Pegram, further stated that in or about the early part of September, 1870, the defendant had carried some cotton for plaintiffs from Charlotte to New York via Charleston at $2.75 per bale.

C. H. Elms stated that on some occasion, when, he could not say, he was at the depot when one of the plaintiffs, Mr. McCauley, had a conversation with the witness, Pegram, and offered to ship a lot of cotton over the defendant's road according to a contract wherein he alleged he had for its shipment over defendant's road with Pegram. This witness was unable to state what the contract was. Defendants excepted to this testimony; it was ruled competent by the Court.

One Wilson McComb, a colored man, testified that he was in the employment of the plaintiffs and marked and prepared their cotton for shipping; that on one occasion he heard Pegram say that he had made a contract for the shipping of plaintiff's cotton, which would relieve him of (544) the trouble of trucking the cotton on the platform. When this conversation occurred he could not say.

His Honor was asked by the defendant to charge that Pegram as a mere local agent, had no authority to make such a contract as stated by McCauley, one of the plaintiffs. That the jury must decide the question as to whether there was such a contract by examining and conciliating all the testimony in the case. That the testimony of McComb as to the declaration of Pegram could only be used as a means of testing the truth of Pegram's statement; and that if the jury believed that Pegram had given a correct account of the matter of his arrangement with the plaintiffs they could not recover.

His Honor charged that Pegram had a right to make the contract testified to by McComb, and as to the other prayer of defendant the Court could not respond to it.

The jury returned a verdict for the plaintiffs. Rule for a new trial granted and discharged. Judgment in accordance with the verdict and appeal by the defendant.

(The plaintiffs filed an amended statement of the case in some particulars, which not being pertinent to the point decided is omitted).

Wilson & Son and *R. Barringer,* for appellant.
Guion, contra.

READE, J. The plaintiff alleges that he made a contract with the defendant, through his agent, Pegram, to transport his cotton to market at a given price, and that the defendant failed to comply with the contract, by reason of which plaintiff was injured, etc. The defendant denied that Pegram was authorized to contract, or that he did in fact contract.

The power in Pegram to contract seems to be clear. He was the local agent at the depot from which the plaintiff's cotton was to be shipped, and was in the habit of making contracts for transportation with the plaintiff and (545) others, and the telegrams, which are a part of the case, show that he was authorized to contract. We agree with his Honor in that.

Plaintiff swore upon the trial that he did make the alleged contract with Pegram. Pegram, for the defendant, swore that he did not. The plaintiff then introduced two witnesses, McComb and Elms, who testified that after the contract was alleged to have been made, they heard Pegram say that he had made a contract with plaintiff. The testimony of McComb and Elms was clearly competent to contradict and discredit Pegram, but it was not competent for the purpose of proving the contract. And yet it was introduced generally. The defendant could not object to the competency of the declarations of Pegram, because they were competent to discredit him, but the defendant had the right to have the jury instructed that while the declarations of Pegram, as proved by McComb, were competent to discredit him, yet they were not competent to prove the contract. And the defendant asked for this instruction and his Honor refused to give it. In 1 Green. Ev., sec. 113, note 2 on page 134, it is said, that "whether the declaration or admission of the agent made in regard to a transaction already passed, but while his agency for similar objects still continues, will bind the principal, does not appear to have been expressly decided, but the weight of authority is in the negative." Numerous cases are cited. That is our case. We have decided the same question in the same way at this term in the case of *McComb v. R. R., ante,* 198.

There is error.

PER CURIAM. *Venire de novo.*

BYNUM, J., did not sit, having been of counsel.

Cited: Henry v. Willard, 73 N. C., 43; *Darlington v. Tel. Co.,* 127 N. C., 450.

(546)

ROBERT MAYNARD v. MATTHEW MOORE.

The deed from a sheriff to the purchaser of land sold under a *ven. ex.* is evidence on a question of title, notwithstanding there is endorsed on such *ven. ex.* a memorandum that there was "no sale for want of compliance."

CIVIL ACTION to recover possession of real estate, tried before *Tourgee, Judge,* Fall Term, 1873, of ALAMANCE Superior Court.

The plaintiff claimed the land in dispute under a sheriff's deed, and on the trial showed a judgment against the defendant and in favor of one Jeremiah Holt, obtained at the December Term, 1861, of the late Court of Pleas and Quarter Sessions, for $150. He also showed a *fi. fa.* issued upon said judgment and returned by the sheriff of Alamance County, levied upon the land in question, and also a *venditioni exponas,* issued to the sheriff, commanding him to sell the said land in accordance with the said levy. Plaintiff then exhibited a deed from the sheriff conveying to him the land sold, in which conveyance was recited the judgment, *fi. fa.* and *ven ex.,* and also the sale of said land under the *ven. ex.* on a certain day, at which sale one J. G. Moore became the purchaser, and assigned his bid to the plaintiff.

The defendant objected to the introduction of this deed as evidence, for the reason that upon the *ven. ex.* was the following endorsement (in pencil): "J. G. Moore, $120," and in ink, "no sale for want of compliance." His Honor held that the indorsement was immaterial and incompetent. Defendant excepted.

The defendant then offered to introduce W. J. Murray, a former deputy sheriff of said county, who made the levy and sale, to contradict the recital in the deed, and also to prove that Moore failed to comply with the terms of the sale by paying the money; that he made the return of no sale upon the *ven. ex.* and returned it to the Clerk on 20 October, 1869; that the assignment of his bid by Moore was not made (547) until 1871; that the plaintiff agreed to pay the judgment of Holt if the sheriff would execute to him a deed to defendant's land; and that in pursuance of such agreement the sheriff executed the deed offered in evidence. That at the time of the execution of said deed the sheriff had no other process in his hands against the defendant, and had had none since the return of the *ven. ex.* mentioned before.

Plaintiff objected to the introduction of this evidence; objection sustained, and defendant again excepted.

Verdict and judgment for the plaintiff. Appeal by the defendant.

Graham & Graham, for appellant:

1. A plaintiff in ejectment can only recover upon his own good title. *Duncan v. Duncan,* 25 N. C., 317.

2. The purchaser at an execution sale must show the judgment, execution, *sale* and sheriff's deeds as against the defendant in the execution . *Duncan v. Duncan,* 25 N. C., 317.

The recital in a sheriff's deed is not an essential (548) part, it affirms no fact, and will not amount to an estoppel. *Daniel, J., arguendo,* in *Huggins v. Ketchum,* 20 N. C., 550; *Hardin v. Cheek,* 48 N. C., 135; *Bryan v. Hubbs,* 69 N. C., 423; *Knight v. Leake,* 19 N. C., 133.

Boyd, contra:

In ejectment for land purchased at a sheriff's sale, under execution, the plaintiff need show as against the defendant in the execution only, first, a judgment, second, an execution giving the sheriff authority to sell, and third, the sheriff's deed. *Thompson v. Hodges,* 7 N. C., 546.

The deed is good to pass the title as against the defendant in the execution notwithstanding the sheriff's return; for the purchaser's title is not dependent upon any special return the sheriff may make on the execution. *Smith v. Kelly,* 7 N. C., 507. See also, *Hatton v. Dew*, 7 N. C., 260; *Graham v. Beman,* 13 N. C., 174.

The sheriff's return is immaterial and cannot affect the right of the plaintiff.

Pearson, C. J. The deed of the sheriff, dated 5 January, 1870, recites that the land was sold at public sale on 4 September, 1869, when J. G. Moore became the last and highest bidder at $250, "who then and there assigned his bid to Robert Maynard," the plaintiff, to whom the sheriff (549) executes the deed on payment of the sum bid.

The defendant objected to the introduction of the deed as evidence, for the reason that upon the *ven. ex.* is the following endorsement in pencil, "$120," and in ink, "*No sale for want of compliance.*" His Honor held that the endorsement was immaterial and incompetent.

We concur with his Honor, that the deed was competent evidence, notwithstanding the endorsement on the *ven. ex.* Surely, *a question of title* is not to be disposed of on a question in regard to the competency of evidence by reason of an objection collateral to the title.

We do not concur in the position taken by the counsel of the defendant, that the return "no sale for want of compliance" is proof that there was *no sale.* On the contrary, we look upon it as a "negative pregnant" (as the books term it). It affirms there was a sale under the writ of *ven. ex.*, but that the sheriff had made his election to abandon the contract of sale, because the bidder had failed to comply with the terms. But the evidence was *material* and *competent* in order to present several questions in regard to the merits of the case. Was this evidence of an election on the part of the sheriff to abandon the contract of sale conclusive and peremptory, or did the sheriff have a *locus penitentiæ* so that he had power to change his purpose and to receive the money from the plaintiff as assignee of the bidder and execute a deed for the land?

This would lead to a further question if the deed of the sheriff be inoperative, inasmuch as the plaintiff has discharged the debt, is he not substituted to the rights of the creditor so as to have an equity to charge the land with the amount of the judgment which he has paid and also to the excess of the price, provided the sheriff has paid such excess over to the defendant?

Or, is the act of the plaintiff, in paying the money and discharging the execution, to be deemed so entirely efficacious as to leave him without remedy? Can the defendant (550) with a good conscience keep the land and take the benefit of having his debt paid off by the plaintiff?

These questions were all cut off by the exclusion of the evidence as to the endorsements upon the *venditioni exponas*. We are of opinion his Honor erred in rejecting this evidence.

Judgment reversed.

PER CURIAM. *Venire de novo.*

Cited: Maynard v. Moore, 76 N. C., 160.

WILLIAM JOHNSTON v. J. E. RANKIN and others, Commissioners, etc.

1. Although there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation, and although the clause to that effect in the Constitution of the United States applies only to acts by the United States, and not to the governments of the States, yet the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina. *State v. Newsom,* 25 N. C., 50; *Davis v. Railroad,* 19 N. C., 451; *State v. Glenn,* 52 N. C., 321; *Cornelius v. Glenn, Ib.,* 512.

2. The Act of 1863, Private Acts, chap. 47, authorizing the Commissioners of the town of Asheville to extend the streets, etc., is not unconstitutional because of the manner therein prescribed, providing compensation to the owners of the land taken or injured by extending such streets.

3. A plaintiff whose land has been taken by the commissioners of a town for public use waives all irregularities in the proceedings condemning such land when he appeals from the assessment of damages by the persons appointed to assess them.

4. Such appeal from the assessment of damages carries up no other question than the amount of the compensation which the plaintiff may be entitled to, and the commissioners are not guilty of a trespass in proceeding with their improvements pending the appeal.

CIVIL ACTION, motion to dissolve a restraining order, heard by *Cloud, Judge,* Fall Term, 1873, TRANSYLVANIA Superior Court.

The facts pertinent to the points decided are fully (551) stated in the opinion of the Court.

From the judgment of the Court below, continuing the injunction to the hearing, the defendants appealed.

J. H. Merrimon, for appellants.
McCorkle & Bailey, for plaintiff.

RODMAN, J. In this action, the plaintiff seeks to (554) recover damages for a trespass on his land by the defendant and his servants and agents in extending over the land and through the plaintiff's enclosure a street of the town of Asheville. As auxiliary to such remedy, and to prevent irreparable damage, he asks for an injunction. The injunction was ordered and at Transylvania Superior Court the defendants moved to vacate it, which the Judge refused to do and from that refusal an appeal was taken.

The defendants in the answer admit the alleged trespass but justify by pleading that defendant Rankin was at (555) the time of the trespass Mayor of the town of Asheville, and as such, by virtue of an act of Assembly, ratified 11 February, 1863 (Private Acts of 1863, chap. 47), had power to extend the streets of said town, as therein prescribed, and that he acted in conformity to said power, and in doing so committed the trespass complained of.

The plaintiff contends:

1. That the act of 1863 was unconstitutional in that it authorized the taking of private property without providing any sufficient means for making compensation.

2. That the defendant did not proceed in accordance with that act, but irregularly, and so he became a trespasser.

3. That plaintiff having appealed from the verdict in the proceedings had under that act the defendant, in proceeding after such appeal and during the pendency thereof, became a trespasser.

If I have in anywise mistaken the points taken by the counsel for the plaintiff, or stated them less clearly or forcibly that he would have done, it is his own fault inasmuch as he has failed to state them succinctly himself, as it was his right and duty to do.

1. Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation; and although the clause to that effect in the Constitution of the United States applies only to acts by the United States, and not to the government of the State, *State v. Newsom,* 27 N. C., 50, yet the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina. *Davis v. R. R.,* 19 N. C., 451; *State v. Glenn,* 52 N. C., 321; *Cornelius v. Glenn, Id.,* 512.

The Act of 1863 does provide compensation for one whose property is taken or injured by extending the streets of Asheville. The plaintiff contends, however, that the provision of the act (sec. 12) that the damages shall be assessed by a jury composed of citizens of the town is unfair and partial, (556) and so does not secure adequate compensation. No man may be a judge or a juror in an action in which he is interested; but that remote and indirect interest, which every person has in an action by reason of his residence within a municipality, which is a party to or interested in the action, has never been held to disqualify him as either. Otherwise a Justice of the Peace or a Judge living in a town or county could never hear an action to which the town or county was a party—an objection altogether novel.

The plaintiff also contends that inasmuch as the jury found no damages to him they must have acted on the principle of setting off the benefits he would receive from the improvement against the damages to him, which mode of assessment is erroneous. As the act prescribes no rule for assessing the damages, the fact that the jury assessed them upon a wrong principle cannot render the act unconstitutional. The plaintiff may have benefit of his proposition, if he is entitled to any, when the damages shall be assessed in the action in which he appealed and which is still pending. It is unnecessary, therefore, to consider now what is the rule in such cases.

2. The proceedings were irregular and void, because the sheriff did not proceed with the jury to view the lands and assess the damages on the day named in the notice to plaintiff, but on a subsequent day, of which the plaintiff had no notice.

If this objection had not been waived by the plaintiff's appeal from the assessment of damages, it would have been good. The sheriff had no jurisdiction to enter on the lands until the plaintiff was made a party to the proceedings by service of notice. The neglect to proceed on the day named without notice of the postponement to the plaintiff operated as a discontinuance as to him and put him out of Court. He might *perhaps* have regarded all after proceedings as trespasses, being under a warrant which was void as to him for want of notice, or he might have brought up the proceedings to the Superior Court by *recordari* and had them quashed and then at least have brought his action for the trespass. But he appeals, and thus vacates the assessment during the pendency of the appeal. By voluntarily becoming a party he waives the irregularity of want of (557) notice and gives the Appellate Court jurisdiction to hear the case on the merits.

3. Upon this question we were referred to no authority. If the mayor and commissioners were the sole judges of the public use and of the necessity of the occasion, as according to the authorities it seems that in general and in the absence of special circumstances they are (Dillon Mun. Corp., sec. 465), then the appeal took up nothing for review but the amount of compensation. No want of *bona fides* is suggested in the defendant, nor any special fact to take the case out of the general rule. We think, therefore, that the only question carried up was the amount of compensation and, this being so, there is nothing to forbid the defendants from proceeding with the improvement pending the appeal. The law of this State does not require compensation to be *first* made, as that of some States does. See *McIntyre v. R. R.,* 67 N. C., 278.

We think there was error in refusing to vacate the injunction. The judgment is therefore reversed and the injunction vacated. But as the case is only in this Court upon the interlocutory order it must be remanded, in order that the Superior Court may proceed according to this opinion, which will be certified.

The defendants will recover costs in this Court.

Per Curiam. Judgment reversed.

Cited: Comrs. v. Johnston, 71 N. C., 399; *Canal Co. v. McAlister,* 74 N. C., 163; *R. R. v. McCaskill,* 94 N. C., 752; *Staton v. R. R.,* 111 N. C., 283; *Eastman v. Comrs.,* 119 N. C., 505; *Phillips v. Tel. Co.,* 130 N. C., 520; *State v. New, Id.,* 737; *Dargan v. R. R.,* 131 N. C., 629; *R. R. v. Platt Land,* 133 N. C., 269.

D. B. DOUGHERTY v. JOHN F. LOGAN.

The lien on land acquired by a docketed judgment shall not be lost in favor of a judgment subsequently docketed, unless the plaintiff in the latter take out execution and give the plaintiff in the former twenty days' notice before the day of sale by the sheriff, and the plaintiff so notified shall fail to take out execution and put it into the sheriff's hands before the day of sale. Rule 19, 63 N. C. Rep., 669.

(*Perry v. Morris*, 65 N. C., 221, cited and approved).

This was a MOTION to *Mitchell, Judge,* at Spring Term, 1873, of ASHE Superior Court, for directions as to the application of certain moneys arising from the sale of land under executions.

The facts are fully stated in the opinion of the Court.

W. P. Caldwell, for the plaintiff.
Folk & Armfield and *Busbee & Busbee, contra.*

SETTLE, J. The sheriff of Ashe County asks the direction of the Court as to the application of money in his hands arising from the sale of land under three executions, one in favor of Jacob Roten, another in favor of John Shatley, and a third in favor of D. B. Dougherty. The judgments on which the three executions issued, and also a judgment in favor of one Long, had been regularly docketed in the Superior Court of Ashe County; the judgments in favor of Roten and Shatley before and that in favor of Dougherty after the docketing of the judgment in favor of Long.

No execution had issued on the judgment in favor of Long. The land did not bring enough to pay all the judgments.

The question presented for decision is not an open one.

We have held in *Perry v. Morris*, 65 N. C., 221, that the lien on the land of the defendant acquired by a docketed judgment shall not be lost in favor of a judgment subsequently docketed, unless the plaintiff in the latter take out execution and give the plaintiff in the former twenty days' notice before the day of sale by the sheriff, and the plaintiff so noticed shall fail to take out execution and put it into the sheriff's hands before the day of sale, as is prescribed in Rule 19 of Practice adopted by the

Supreme Court, 63 N. C., 669. Dougherty having failed to quicken the diligence of Long by the notice required in the rule, there is error in the order directing the application of the fund to the satisfaction of the execution in favor of Dougherty to the exclusion of the judgment in favor of Long.

The fund should be applied to the satisfaction of the judgments in the order in point of time in which they are entered on the docket.

Let this be certified.

Per Curiam. Judgment accordingly.

Cited: Dancy v. Hubbs, 71 N. C., 425; *Burton v. Spiers,* 92 N. C., 508.

J. M. HOWIE v. ROBERT R. REA.

1. In an action to recover the stipulated price of certain castings, the defendant can show that the castings were not such as he contracted for and were not suited to the purposes for which they were designed; and the jury, in their verdict, can allow the defendant the difference of value between the castings delivered and those contracted for.
2. In such case the defendant, by receiving the castings, so that he cannot return them, does not abandon his right either to sue for a breach of contract or to insist in his defense on a reduction of the price agreed to be paid.

(*Thomas v. Francis,* 34 N. C., 282, cited and approved).

Civil action upon an alleged contract, tried before *Moore, Judge,* Special (July) Term, 1873, Superior Court of Mecklenburg.

(560) The plaintiff for himself testified that he agreed to make for defendant, of cast iron, a large twelve-foot driving wheel and arms to support it, and also a three-foot pinion to work into the teeth of the driving wheel and be driven by it, and other appendages not necessary here to mention—the whole to be used in the construction of a flouring mill. Plaintiff also stated that he was to be paid at the rate of 5½ cents per pound for the same. That he made the arms and segments of the driving wheel and delivered them to the defendant; but that in delivering the castings to the

wagons that called for them a mistake was made in the delivery of the proper pinion and one was delivered that was not suited or intended to be used or connected with the large wheel. That he had never delivered the proper pinion, though when informed by the defendant that the machinery would not work and that part of it had been broken in trying it he had offered to send the right pinion in his own wagon; to which proposition the defendant returned no answer.

Defendant testified that in the month of June he contracted with the plaintiff for the kind of castings stated by him, but with the express understanding that he was to pay for the same $250 and no more; that within a month or so after making this contract the defendant sold his real estate and mill-site for which the machinery was intended to a powder mill company, which agreed to receive the arms and wheels contracted for by the defendant. That he, the defendant, lived near the place, and when the machinery was received several months afterwards and put up it would not operate, and on the trial several parts of it were broken and it was thrown aside as useless. Afterwards the Powder Mill Company put up a wooden circular rim and to it bolted the cast-iron segments and getting a new pinion worked with it. Defendant further stated that the Powder Mill Company received the machinery and never made any claim upon him for its deficiencies and had paid him for it when, at the time of the purchase, the company paid for the mill-site and land. Defendant had never offered to return the machinery nor asked the plaintiff to take it back or (561) exchange it.

The mill-wright engaged upon the work stated that he had accompanied the defendant when he contracted with the plaintiff and specifically described the kind and size of wheels and other parts wanted, and that plaintiff agreed to make the same for $250. That after the defendant sold the property he continued to work at the same mill for the Powder Mill Company; that he received the castings and arms and pinions and proceeded to put them up, and on trial found that they had not been made in a suitable and workmanlike manner adapted to the end for which they were made. That upon trial, not gearing properly, and from the segments having sprung, or being in a twist, several parts were broken apart and thrown aside, and wooden gearing substituted in their place.

Amongst other things, at the request of the plaintiff's counsel, the Court charged the jury that although the castings had been made in an unworkmanlike manner, and were not adapted to the purposes designed, yet if the defendant sold them and received pay for them before any part had been delivered, and the Powder Mill Company received the castings and made no complaint to the plaintiff or the defendant on account of the defects, then the plaintiff should recover the amount contracted to be paid therefor. To this defendant excepted.

The jury returned a verdict for the plaintiff. Rule for a new trial granted and discharged. Judgment and appeal by the defendant.

Guion and *Jones & Johnston,* for appellant.
Vance & Dowd, contra.

BYNUM, J. 1. Formerly it was the practice when an action was brought for an agreed price of work which was to be performed according to contract to allow the plaintiff to recover the stipulated sum, leaving the defendant to his cross action for breach of the contract; because the law con- (562) strued the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would deprive the plaintiff of the whole price, and therefore the defendant was obliged to pay the price and recover for any breach of contract on the other side. Such seems to have been his Honor's view in this case, for, in effect, he charged the jury that the defendant having by his acts accepted the work without complaint was obliged to pay the contract price, although it was done in an unworkmanlike manner.

2. But after the case of *Barton v. Butler,* 9 East., 479, a new departure in the practice began, and being attended with great convenience has since been generally followed. The defendant was permitted to show that the work, in consequence of the non-performance of the contract, was dimin-

ished in value, and the rule was established that it was competent for the defendant not to set off by a procedure in the nature of a cross action the amount of damages which he had sustained by reason of the breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of the contract, and to the extent that he obtained an abatement of the price he was considered as having received satisfaction for the breach of contract, and to that extent, but no more, he was precluded from recovery in another action. So it became established, first, that the buyer might set up the objective quality of the work in diminution of the price; and second, that he might bring a cross action if he desired to claim special or consequential damages, which latter action was not barred by reason of his having obtained a diminution of the price in a previous action brought by the vendor.

3. The third and last improvement in pleading and practice is that introduced by C. C. P., secs. 100 and 101, wherein the defendant may not only set up the defense of a defect in the quality of his purchase and reduce the judgment by the amount of the difference in value of the article as contracted for and as received, but he also has the (563) benefit of the cross action, and can, by counter claim, obtain affirmative relief to the extent of any special or consequential damage sustained.

Numerous cases established the foregoing propositions. In *Poulton v. Lattimore,* 9 B. & C., 239, the buyer's defense in an action for the price was successful for the whole amount of the price. The vendor sued to recover the price of seed, warranted to be good growing seed, which the purchaser had sold to two other persons, who proved that the seed was worthless, and that they neither had paid or would pay for it. And it was further held in the same case that the buyer might insist on his defense without returning or offering to return the seed, and might even sustain a direct action for damages against the vendor without previous notice. In *Mondell v. Steel,* M. & W., 858, a leading case, it is held that although the buyer by his acceptance of the article has the title indefeasibly vested in him so that he cannot return it, yet that does not constitute an abandonment of his remedy by cross action or his right to insist in defense on the reduction of the price. And in *Dengle v. Hare,* 7 C. & B. (N. S.), 145, the Court went farther and held that the jury had properly allowed the purchaser the difference of value between the article delivered and the article as warranted; and in *Jones v. Just,* 3 Q. B., 197, the buyer recovered as damages £750, although by reason of a rise in the market he sold the inferior article for about as much as he originally gave for it. In *Randall v. Raper,* 27 Q. B., 266, it was held that the buyer could recover all the damages he would be liable for to his sub-vendees, although the plaintiff had not paid the claims of the sub-vendees, because the buyer was *liable* over, and therefore these damages were the necessary consequence of the breach of contract by the original vendor.

In our case the defendant by his conduct accepted the machinery and made it his own, and he is liable for the value of the work as done and delivered. The rule for ascertaining the amount due is "if the work contracted for is worth (564) the sum agreed, what is it worth as done?" *Farmer v. Francis,* 34 N. C., 282; Benj. Sales, 572-3.

As the plaintiff appears to be entitled to recover something under our liberal system of pleading, we cannot allow the motion to dismiss because of the variance between the allegation and proof, but suggest that the plaintiff amend his complaint so as to conform to his proof.

Per Curiam. *Venire de novo.*

Cited: McKinnon v. McIntosh, 98 N. C., 92.

J. N. UZZLE v. THE COMMISSIONERS OF FRANKLIN COUNTY.

Where a plaintiff holds a debt against a county, contracted since the adoption of the Constitution, for the ordinary and necessary expenses of the county, and where the county has the means to pay the debt, such plaintiff is entitled to a peremptory *mandamus,* and it was error in the Court below to refuse it.

(*Street v. Comrs., Haughton v. Comrs., Edwards v. Comrs.,* at this term; and *Pegram v. Comrs.,* 64 N. C., 557, cited and approved).

CIVIL ACTION, tried before *Watts, Judge,* at Fall Term, 1873, of the Superior Court of FRANKLIN, upon the following agreed state of facts:

1. That the debt sued for by the plaintiff, the amount of which is fixed by the judgment in this action, to-wit, $2,138.61, was for the necessary and ordinary expenses of the county government.

2. That the tax levied by the State is twenty cents on the one hundred dollars worth of property, and that the defendants have levied a tax for county purposes of forty cents on the one hundred of property, or double the amount of the State tax.

3. That the current expenses of the county government for the year amounted to about six thousand dollars; that the taxes assessed and levied on the property of the county for county purposes amount to about eleven thousand dollars.

4. That the sheriff of the county, acting with the (565) approval and authority of the defendants, is receiving county scrip in payment of these taxes.

5. That the county of Franklin was indebted in the sum of at least $15,000 at the time of the adoption of the State Constitution; that since that time $10,000 of this debt has been paid out of the county taxes.

A special tax of about $6,000 was levied in 1869.

Upon the foregoing state of facts his Honor refused the peremptory *mandamus* asked for by the plaintiff, whereupon the plaintiff appealed.

Cooke & Spencer and *Merrimon & Ashe, for plaintiff.*
Davis and *Battle & Son, contra.*

READE, J. There was error in refusing the *mandamus.* The case shows that the defendants have ample means with which to pay the plaintiff's debt. The current expenses of the county are $6,000. The tax list will raise $11,000, which leaves a surplus of $5,000. Why may not that pay the debt? We infer from what is stated (it is not plainly stated) that this surplus is applied towards the payment of the ante-war county debt. There is no necessity for this; because, although that debt has to be paid, yet a tax to pay that debt may be levied without regard to equation or limitation. And that would leave the surplus of the present tax to be applied to the plaintiff's debt.

The questions involved have been considered and decided in several cases at this term, and need not be further elaborated. *Street v. Comrs., post,* 644; *Haughton v. Comrs., ante,* 466; *Edwards v. Comrs., post,* 571. And see *Pegram v. Comrs.,* 64 N. C., 557.

This will be certified, to the end that a peremptory *mandamus* may issue, etc.

PER CURIAM. Judgment reversed.

Cited: McLendon v. Comrs., 71 N. C., 42.

(566)

THOMAS H. BREM and JOHN S. MEANS v. THOMAS JAMIESON.

1. Where an execution issued from the County Court in 1861 and regularly thereafter until the Spring Term, 1867, of the Superior Court, to which Court it was transferred under the ordinance of 23 June, 1866, but no motion made at said Spring Term, 1867, to docket it in the Superior Court, and the same was not re-issued until December (Special) Term, 1867, such execution lost its lien on the land levied upon, and a sale of the land by virtue thereof conveyed no title.
2. Where the name of one or more of the defendants is omitted in an *alias* execution regularly issued before that time and levied on the land of such defendant, the omission is fatal, and a sale of the land under such execution is invalid.

CIVIL ACTION for the recovery of the possession of land, tried before *Moore, Judge,* Special (July) Term, 1873, of the Superior Court of MECKLENBURG.

On the trial below, the jury found the following facts:

At a Court of Pleas and Quarter Sessions of Mecklenburg County, held in April, 1861, the plaintiff recovered a judgment in an action of debt against J. C. Abernathy, R. F. Blythe and William Means for $291.15 of which $250 was principal money.

Executions thereon were regularly issued and returned from term to term, until the County Court held for said county on the fourth Monday of October, 1866. The last County Court held on the fourth Monday of October, 1866, execution issued from October Term, 1865, returnable to October Term, 1866. On the first day of November, 1866, at the request of the plaintiff, a transcript of the case was returned to the Superior Court with all the executions issued from said County Court, and notice was issued to and served upon the defendant, J. C. Abernathy, in said execution as follows:

"STATE OF NORTH CAROLINA.

"To the Sheriff of Mecklenburg County:

"You are hereby commanded to make known to J. C. Abernathy, R. F. Blythe and William Means, that agreeably to an order of the State Convention I have transmitted to the Superior Court a judgment obtained in the County Court against them in favor of Thomas H. Brem.

"Witness: William Howell, Clerk of our said Court, at office, the second Monday in January, 1867. Issued 8 February, 1867."

This was returned to the Superior Court, endorsed "Executed 29 March, 1867."

At Spring Term, 1867, of the Superior Court, the case is stated on the trial docket as No. 355; at Fall Term as No. 299, and marked continued. At the Special Term of said Court in December it is stated as No. 209, and the following entry appears: "Judgment of the County Court confirmed as of this Term." From this Term an execution from the Superior Court issued on 29 January, 1868, tested the second Monday in December, 1867, stating that judgment was rendered 9 December, 1867, which was returned not collected. Another *fi. fa.*, issued from said Court 11 June, 1868, tested as of the ninth Monday after the fourth Monday in February, 1868, returnable to Fall Term, 1868. In said last execution only the name of J. C. Abernathy is inserted, the names of the other defendants, Blythe and Means, being omitted. Another *fi. fa.*, issued after the Fall Term, on 12 January, 1869, against all the defendants returnable to the next Superior Court. On this the sheriff endorsed a levy on the lands, the subject of this controversy, as the property of the defendant, Means, said endorsement dated 17 January, 1869, and the same was returned to Spring Term, 1869.

On 25 June, 1869, a *ven. ex.* issued to sell the lands levied on, and the same was returned not collected. At Fall Term, 1869, another *ven. ex.* issued returnable to Spring Term, 1870. This was not collected as was a similar one (568) issued to the Fall Term. At this term another *ven. ex.* issued under which the sheriff sold the land levied on and the plaintiffs, Thomas H. Brem and John S. Means, purchased it.

The jury also find that the sheriff executed a deed to the plaintiffs in fee for the land. That William Means conveyed the same to W. F. Davidson on 22 January, 1867, putting him in possession, and that Davidson conveyed said lands to Smith and McCormick who placed the defendant Jamieson in possession who is now holding the same adversely to the plaintiffs.

The jury also find that the rents and profits of the land, from the date of the plaintiffs' deed to the time of the trial, is $125. But whether or not, upon the whole matter aforesaid, the defendant Jamieson is guilty of unlawfully withholding the possession of the premises from the plaintiffs, the jurors are wholly ignorant, and therefore pray the advice of the Court. And if upon the whole matter aforesaid, it shall seem to the Court that the defendant Jamieson is guilty of unlawfully withholding the possession of the said premises from the plaintiffs, then the jury so find him, and assess the plaintiffs' damages at $125. But if upon the whole matter it shall seem to the Court that the said Jamieson is not guilty of unlawfully withholding the possession of said premises, then the jury find him not guilty.

The Court being of opinion with the defendant, gave judgment that he go without day, and that he recover his costs against the plaintiff.

From this judgment the plaintiffs appealed.

Guion, for appellants.
Vance and *Burwell* and *McCorkle & Bailey, contra.*

SETTLE, J. It was incumbent on the plaintiffs to maintain that the lien on the lands of William Means, acquired by the judgment in 1861, had been preserved by regular and successive executions, until the sale of the land in 1871. This he has failed to do. There are two links wanting (569) in the plaintiffs' chain of title, the absence of which renders it worthless:

1. The gap in the executions from Spring Term, 1867, until the Special Term in December of the same year.
2. The name of William Means was omitted from the execution which issued from Spring Term, 1868, returnable to Fall Term, 1868.

The ordinance of the Convention of June 23, 1866, provided for the transfer of all actions of debt, covenant, assumpsit and account from the County Courts to the Spring Terms, 1867, of the Superior Courts, and declared that *"at the Spring Terms aforesaid, the Court shall, on motion,* order the said judgments to be entered on the minute dockets, provided the same were not dormant when transmitted from the County Courts; and on such entries being made, the said judgments shall be taken and held to be judgments of the Superior Courts, and writs of *fieri facias* and *venditioni exponas* may issue, as provided in section ten of this ordinance, following the writs transmitted from the County Courts, and preserving the liens, as if issued by the same Court. Section 10 provides that no writs of *fi. fa.* or *ven. ex.* on judgments in debt, etc., shall issue from Spring Term, 1867, without permission of the Court.

The learned counsel for the plaintiffs attempted to bridge over the first chasm by showing that in obedience to the ordinance the plaintiffs had caused a transcript of the case to be returned to the Spring Term, 1867, of the Superior Court for Mecklenburg County, with all the *fi. fas.* that had been issued on the judgment since 1871, and that they had pursued the regular course prescribed by law from 1861 to Spring Term, 1867; and he says that inasmuch as the docket was crowded at Spring Term, 1867, by the transfer of business from the County to the Superior Court, he could not get the ear of the Court to move that his judgment be entered on the minute docket, and that he have execution thereon, as prescribed by the ordinance; and he insists that as he made the motion as soon as he could get the ear of the Court he ought not to be prejudiced by the delay. (570)

It is true that the act of the law shall prejudice no one. But it does not appear that the plaintiffs endeavored to get the ear of the Court. Such motions were generally allowed as a matter of course, and the plaintiffs should have alleged and shown that they endeavored to take action at Spring Term, 1867, in order to place them under the maxim, *vigilantibus non dormentibus jura subveniunt.*

Although they appear to have been vigilant from 1861 to 1867, yet we need not cite authority to show that the gap in the executions from Spring Term, 1867, until the Special Term in December of the same year destroyed the lien theretofore existing.

If, however, we were to yield to the forcible argument of the plaintiffs' counsel and pass by this objection, we would be immediately confronted by the insuperable defect in the execution which issued from Spring Term, 1868, returnable to Fall Term, 1868.

There were three defendants in the judgment, to-wit, J. C. Abernathy, R. F. Blythe and William Means, and all the executions had gone against them all, until Spring Term, 1868, when the execution was issued against Abernathy alone, omitting the name of Blythe and also the name of Means, the owner of the land in controversy. This defect was also sufficient to destroy the lien on the land of Means, and to break the chain by which the plaintiffs claim title.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

BYNUM, J., did not sit.

Cited: Wade v. Pelletier, 71 N. C., 76.

H. S. EDWARDS v. THE BOARD OF COMMISSIONERS OF WILKES COUNTY.

1. In an action against the Board of Commissioners of one county, brought to the Superior Court of an adjoining county, objection to the venue must be taken in that Court; otherwise the objection will be considered as waived.
2. A creditor of a county cannot be compelled either by the Legislature or by the Board of Commissioners to "bond" his debt and wait five years for its ultimate satisfaction; such creditor is entitled to a peremptory *mandamus*.

(*Johnson v. Comrs.*, 67 N. C., 101; *Sedberry v. Comrs.*, 66 N. C., 486, cited and approved).

MOTION for a peremptory *mandamus*, heard before *Mitchell, Judge,* Fall Term, 1873, Superior Court of ALLEGHANY.

The plaintiff had obtained a judgment against the defendants for $1,643.93, and issued a notice to show cause why a *mandamus* should not issue to the defendants, compelling the board to levy taxes, etc. Upon the return of the notice the defendants answered, which his Honor, holding to be insufficient, ordered a peremptory *mandamus* to issue, from which order defendants appealed.

Furches, for appellants.
Folk & Armfield, contra.

READE, J. The objection to the jurisdiction that the action was brought in the county of Alleghany, where the plaintiff resides, instead of in Wilkes, where the defendants reside, and of which latter county they are the Board of Commissioners, would have been fatal if it had been taken in apt time. It was not taken below, but was taken for the first time in this Court. And although it is true that the objection that the Court has not jurisdiction of the subject-matter may be taken at any time, yet it is otherwise when the Court has jurisdiction of the subject-matter, but the venue is wrong. The objection to the venue may be waived, and if not taken below it is to be taken as waived and cannot be taken here. *Leach v. R. R.,* 65 N. C., 486; *Alexander v. Comrs.,* 67 N. C., 330.

We agree with his Honor that the defendants' return sets up no sufficient excuse for not paying the plaintiff his debt, and that a peremptory *mandamus* should issue. We are not informed whether the debt existed before the adoption of the Constitution or has been contracted since. And we see nothing in the case to make the enquiry important. The plaintiff's debt was in existence at the time when the Legislature passed the act requiring the debts of the county to be bonded, and directing a tax levy to pay the interest and one-fifth of the principal annually, and forbidding any other tax, upon which act the defendants rely, saying that they had levied the tax to pay one-fifth, etc., and refused to levy any other tax. It may be considerate and prudent in the defendants not to oppress the people with a levy of taxes to pay *all* the debts of the county *in one year,* but still a creditor of the county cannot be compelled, either by the Legislature or by the Board of Commissioners, to "bond" his debt and wait five years for its ultimate satisfaction. Some indulgence, it is true, must be allowed in order to enable the Board, through the usual machinery, to provide the funds, just as an individual is indulged until the machinery of the Courts can operate, which is supposed to be sufficient to give him reasonable time to provide funds to meet a debt. But levying taxes is not the *only* way which the defendants have to meet the plaintiff's debt. A liberal construction of the statute upon which they rely enables them not only to give a creditor a bond for his debt if he will take it and indulge the county, but if he will not take it, then to raise money by the issue of bonds, and with the money so raised to pay off the debt.
Johnson v. Comrs., 67 N. C., 101; *Sedberry v.*
(573) *Comrs.,* 66 N. C., 486.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

Cited: Uzzle v. Comrs., ante, 565; *Bank v. Comrs.,* 135 N. C., 252.

W. J. HAYES, administrator, etc., v. R. F. and J. R. DAVIDSON and others.

1. If a plaintiff has, by his promise to compromise and take less than the whole of his demand, induced any other creditor to accept a composition and discharge the defendant from further liability, he cannot afterwards enforce his claim, since it would be a fraud upon that creditor.
2. An agreement to accept a less sum does not bar a demand for a greater when there is no other consideration.

(*McKenzie v. Culbreth*, 66 N. C., 534; *Bryan v. Foy*, 69 N. C., 45, cited and approved).

CIVIL ACTION to recover the amount of a single bill, tried before *Moore, Judge,* Special (July) Term, 1878, of MECKLENBURG Superior Court.

The complaint alleges that the defendants, the Davidsons, signed and delivered to William Johnston, the guardian of the plaintiff's intestate, the bill sued upon; that afterwards, the said defendants executed a deed in trust to secure their creditors, under which their property was sold and all their creditors paid with the exception of the plaintiff, and that from the proceeds of such sale, after the payment of the other creditors, they have funds more than sufficient to pay his, the plaintiff's, claim.

It is further alleged that of this trust fund the Davidsons, or their trustee, assigned to the other defendant a note in payment of a debt not secured by the deed in trust.

The answers of the defendants admit the material allegations contained in the complaint and rely for a defense that other creditors secured in the deed com- (574) promised their claims and took less than the claims called for, and that the plaintiff promised to compromise his, which he afterwards refused to do. That without such compromise the funds arising from the sale of the property conveyed in the deed would not have been sufficient to pay the debts.

The plaintiff demurred to the answers of the defendants for insufficiency, etc., and the Court sustained the demurrer, giving the plaintiff judgment for the whole amount he claimed.

Defendants appealed.

R. Barringer and *Vance & Dowd,* for appellants.
Jones & Johnston, contra.

SETTLE, J. This case is before us by appeal from the ruling of his Honor sustaining the demurrer to the answers of the defendants.

The answer of the Davidsons admits several allegations of the complaint; and amongst others the sixth, to-wit: "That after the discharge of all the other debts specified in the said deed there remained in the hands of the said trustees a fund, the proceeds of the property conveyed by said deed, amply sufficient to pay and discharge the debt due to the plaintiff as administrator." But they allege that the plaintiff had agreed with them (the trustees) "to compromise his debt on as favorable terms as any of the other creditors would compromise upon."

If the plaintiff had by his promise to compromise and take less than the whole of his demand induced any other creditor to accept a composition and discharge the defendants from further liability he could not afterwards enforce his claim, since it would be a fraud upon that creditor. *Wood v. Roberts,* 2 Starke, 417. But the acceptance, or the agreement to accept of a less sum does not bar a demand for a (575) greater when there is no other consideration. *McKenzie v. Culbreth,* 66 N. C., 534; *Bryan v. Foy,* 69 N. C., 45.

And in our case it does not appear that the other creditors acted in concert with the plaintiff and released any portion of their debts in consequence of his promise to do so, nor does it appear that they were prejudiced or surprised by the refusal of the plaintiff to accept less than his whole debt.

The trustees seem to have approached each creditor separately and to have compromised with each upon such terms as they could obtain. And each creditor seems to have acted on his own judgment and sympathies independently of what the others might do.

The promise being unsupported by a consideration is not obligatory; and the plaintiff, whether from caprice or any other motive, was at liberty to refuse taking less than his whole demand.

But as the defendant Barringer is only liable secondarily (having acquired a portion of the trust fund with notice), the judgment of the Superior Court must be modified so as to hold him liable for only such portion of the debt, if any, as cannot be made out of the trustees.

Let judgment be entered here in accordance with this opinion.

PER CURIAM. Judgment accordingly.

Cited: Mitchell v. Sawyer, 71 N. C., 73; *Koonce v. Russell,* 103 N. C., 181; *Bank v. Comrs.,* 116 N. C., 362; *Wittkowsky v. Baruch,* 127 N. C., 318.

(576)

JOHN WALKER, executor of MATHEW WALLACE, v. J. B. JOHNSTON and wife and others.

1. When a legacy is given to a class, as to the children of A, with no preceding estate, such only as can answer to the call at the death of the testator can take, for the ownership is then to be fixed and the estate must devolve upon those who answer the description.
2. When, however, there is a preceding life estate, so that the ownership is filled for the time, and there is no absolute necessity to make a peremptory call for the takers of the ultimate estate, the matter is left open until the determination of the life estate, with a view of taking in as many objects of the testator's bounty as come within the description and can answer to the call when it is necessary for the ownership to devolve and be fixed.
3. A legacy to A, who was *nullius filius* and who died intestate without children, does not go to the brothers and sisters of his mother, but escheats to the University.

SPECIAL PROCEEDING before the Court of Probate of MECKLENBURG to obtain a construction of a will, from whence it was removed to the Superior Court where the case was heard before *Logan, Judge,* at Fall Term, 1873.

Matthew Wallace, the plaintiff's testator, died in 1831, leaving a will, of which the following are the clauses upon which a construction is asked:

"3. I will and bequeath to my sister Catherine all that body of land on which I now live, which is held by three several titles, adjoining the lands of Matthew B. Wallace and that of the estate of Alfred Wallace, deceased, Matthew Wallace and Wilson Wallace. I also bequeath to the same another tract known as the Allen tract, adjoining the lands of William Wallace, the old Fox place and the Stone House Lucky place. I also will the same sister my plantation which I purchased from John Wilson, adjoining, etc., and any lot of land belonging to me not herein mentioned—the whole of which land I allow my sister Catherine to have for her own use and benefit during her natural life-time, and then to be disposed of as hereinafter provided for."

(577) By the sixth clause of his will the said testator directed as follows:

"It is further my will and desire that at the death of my sister Catherine all the land and negroes herein bequeathed to my sister Catherine, with their increase, be sold on a credit of twelve months and the proceeds of such sale to be divided as follows, viz.: To my brother, John Wallace, one-fourth, if living; if not, to his children; one-fourth to James Wallace, sister Jane's son; one-fourth to my brother William Wallace's children equally; and one-fourth to my sister Mary Wallace's children equally."

Catherine Wallace died in 1870, and the lands were sold by plaintiff as directed, the proceeds being in the hands of plaintiff ready for distribution.

John Wallace, the brother above mentioned, survived the testator, but died in the life-time of Catherine. Jane, the wife of the defendant J. B. Johnston, and others, are the children of the said John. The defendant, John R. Wallace, is a son of Matthew A., deceased, who was also a son of the said John, and who survived his father but died in the life-time of Catherine. He represents a class.

William Wallace, another brother above mentioned, died in the life-time of the testator, leaving children who were living at the death of the said Catherine, and also grandchildren.

Elizabeth, wife of defendant John Wilson is a daughter of the sister Mary above spoken of, who with others of the same class also survived the said Catherine.

There are other children and grandchildren of the brothers and sisters mentioned in the will, whose relationship is fully set out and fully explained in the opinion of *Chief Justice Pearson.*

His Honor, after argument, adjudged:

1. That the one-fourth part bequeathed to John Wallace was contingent upon his surviving his sister Catherine. He having died before her the fourth vested in those of his children living at the death of the said Catherine. That the defendant John R. Wallace and the class repre- (578) sented by him being grandchildren whose parents died before Catherine are entitled to no part of this fourth.

2. That the bequest of one-fourth to my brother William Wallace's children equally is to be paid to such of his children as were alive at the death of Catherine. That the defendant Samuel W. Wallace and the class represented by him not falling within that description are entitled to no portion of said fourth as legatees.

3. That the fourth bequeathed to Mary Wallace's children be distributed between such of her children as were alive at the death of Catherine, and that the defendant Robert B. Wallace and the class represented by him not falling within said description, being grandchildren, are entitled to no portion thereof.

4. That James Wallace being an illegitimate son of Jane, a sister of the testator, took a vested interest in one-fourth of the property bequeathed, and the same being ordered to be sold for distribution between the legatees is to be considered personal estate; and that this fourth did not escheat to the University of North Carolina but should be paid to his personal representatives to be divided between those who may be entitled thereto.

From which judgment the defendants appealed.

Guion, R. Barringer, Dowd, Brown and *McCorkle & Bailey,* for appellants.

Wilson & Son, contra.

PEARSON, C. J. Owing to the number of classes and the many individuals composing the classes at the opening of the case it seemed to be very complicated. Upon examination, we find there is really no difficulty presented by the provisions of the will, and the only matter is to "call the roll" and let each man take place in his company, a task which I will not undertake, leaving it to be performed by a reference.

1. The will directs a sale of *the land* at the death (579) of the testator's sister Catherine, the proceeds of sale to go into the common fund, thus the *land* is converted into personal estate.

2. John Walker, the brother of the testator, died before the termination of the life estate of his sister Catherine, so it is the same as if he had not been referred to, and the legacy is "to the children of his brother John."

3. So we have a fund—one-fourth to the children of John, one-fourth to the children of William, and one-fourth to the children of Mary. The mode of distribution is settled. See Iredell on Executors, and Williams on Executors.

When a legacy is given to a class—as to the children of A—with no preceding estate, only such as can answer to the call at the death of the testator can take, for the ownership is then to be fixed and the estate must devolve upon those who answer the description. So children of A born after the death of the testator are excluded, as are also the children of a child of A, such child having died before the testator, for these children of a child of A do not fill the description. But when there is a preceding life estate so that the ownership is filled for the time, and there is no absolute necessity to make a peremptory call for the takers of the ultimate estate, the matter is left open until the determination of the life estate, with a view of taking in as many of the objects of the testator's bounty as come within the description and can answer to the call when it is necessary for the ownership to devolve and be fixed.

It follows that all of the children of John, William and Mary who were living at the death of the testator, or who were born before the legatee for life, had vested interests, and the shares of any who died between the death of the testator and the death of the legatee for life devolved upon their personal representative.

It also follows that no child born after the death of the legatee for life could have taken, for the door was (580) closed by that event. There are no such claimants in this case, but the argument required a reference to them.

It also follows that the children of any child of John, William or Mary, whose parent was dead at the death of the testator, cannot take, for the child of a child does not answer the description, and we cannot add the words, "the children of any child who is now dead," although we have no doubt the testator, if he had thought about it, would have added those words, for he was distributing by classes, and the children of a deceased nephew or niece, by representing the parent, would bring themselves up to that class; but this right of representation is not provided for and we cannot supply the omission.

4. We think the University is entitled to the one-fourth part given to "James Walker," his sister Jane's son.

James was a bastard, and died intestate and without children and has no kin. By the common law a bastard was *nullius filius*, he was the child of no one in contemplation of law; and even *his mother* was not supposed to be kin to him.

This rigidness of the common law has been relaxed by statute so as to recognize the brothers and sisters of a bastard and his mother as being of kin to him; but it cannot be extended, by even a strained construction, to the children of the brothers and sisters of his mother.

The judgment in the Court below will be modified according to this opinion, and the case will be remanded, to the end that a reference may fix the amount of the fund and may ascertain the individuals entitled to take under the several classes and the amounts to be paid to each; and that the deceased children may be represented by an administrator, who will pay debts, if any, and distribute according to law.

Judgment modified. Costs to be paid out of the fund.

PER CURIAM. Judgment accordingly.

(581)

THOMAS L. JOHNSTON v. M. L. DAVIS, administrator, etc.

The Superior Courts, in term time, have, under the Act of 1872-'73, chap. 175, jurisdiction of actions by creditors against administrators.

(*Bell v. King, ante,* 330, cited and approved).

CIVIL ACTION for the recovery of a Justice's judgment, tried upon a demurrer to the complaint, before *Moore, Judge,* Special (July) Term, 1873, of MECKLENBURG Superior Court.

The facts pertinent to the point decided are fully set forth in the opinion of the Court.

His Honor overruled the demurrer, and defendant appealed.

Wilson & Son, for appellant.
Jones & Johnston, contra.

RODMAN, J. The facts, so far as they are necessary for an understanding of the questions presented, are as follows:

The action was brought in the Superior Court before the Judge at Fall Term, 1872, on a summons dated 9 August, 1872, by the plaintiff, on behalf of himself and all others, creditors of one Harris, alleging that Harris died intestate in 1865, and that the defendant became his administrator in 1865; that the defendant received personal property and sold the land and received the proceeds; that plaintiff is a creditor by virtue of a judgment obtained against the administrator before a Justice in 1872. Plaintiff asks an account and payment. Defendant demurs for want of jurisdiction in the Court and contends that the action should have begun before the Probate Judge.

It will be seen that this action was begun before the passage of the Act of 1872-'73, chap. 175, ratified 3 March, 1873 (not to be found in Battle's Revisal).

Several cases decided at this term, *Bell v. King, ante,* 330, hold that however the law might have been independent of that act, it cures any defect of jurisdiction and (582) allows it to the Superior Court in term time.

PER CURIAM. Demurrer overruled and case remanded.

Cited: Johnson v. Futrell, 86 N. C., 125.

FANNIE WILLIAMS and another v. J. A. SHARPE.

The Court below has no power to allow an amendment to an execution so as to divest the title acquired by a subsequent innocent purchaser without notice.

(*Phillipse v. Higdon,* 44 N. C., 280; *Davidson v. Cowan,* 12 N. C., 364; *Purcell v. McFarland,* 23 N. C., 34; and *Bank v. Williamson,* 24 N. C., 147, cited and approved).

MOTION to amend an execution heard before *Cannon, Judge,* at Fall Term, 1873, of DAVIE Superior Court.

All the facts pertinent to the point decided are stated in the opinion of the Court.

His Honor being of opinion that he had no power to make the amendment moved for refused the motion, whereupon the plaintiffs appealed.

J. M. McCorkle, for appellants.
Fowle, Bailey and *Armfield, contra.*

BYNUM, J. This was a motion made in the Court below, on notice to the defendant, that the sheriff be allowed to amend his return on two executions in favor of the plaintiffs and against one W. B. March. The executions were returnable to Spring Term, 1869, when and where the sheriff made the following return, viz.: "The property sold, terms not complied with." Another execution against the same defendant was issued in favor of one McKee, (583) returnable to Fall Term, 1869, under which the defendant became the purchaser and took the sheriff's deed before this motion was made or notice given. At the time of this motion a suit was pending for the recovery of the land between Sharpe as plaintiff, and the plaintiffs herein as defendants.

The Judge below denied the motion on the ground of want of power to make the amendment. Extensive powers of amendment are conferred upon the Courts by C. C. P., 132, 3, and a liberal exercise of the power is encouraged in order to reach the merits of controversies and promote the ends of justice. But that power would lose all its value if it were to be used to the prejudice of third parties who have acquired rights without any notice, and in ignorance, perhaps in consequence, of the very defect or omission proposed to be corrected by the amendment.

Take this case. The defendant searching the records and finding from the sheriff's returns that the property had not been sold purchases at a subsequent sale by the sheriff and receives a deed of conveyance and thus acquires the legal title. Besides the legal title, the equity of the defendant is equal to or greater than the plaintiffs, who, if they have any rights, have slept upon them for four years.

The purpose of the plaintiffs is to so amend the records as in effect to divest the title of the defendant and enable the plaintiffs to defeat an innocent purchaser for value and without notice. If the bidder at the first sale complied with the terms and became the purchaser, then the sheriff has simply made a false return and subjected himself to an action in which this alleged purchaser can obtain redress. How this is does not appear, nor does it appear why the sheriff is not a party to this motion or to a rule upon him to show cause why he should not make title to this first purchaser.

In *Phillipse v. Higdon,* 44 N. C., 380, the Court held "that where the amendment is for the purpose of making the process different, in substance, from what it was when it (584) issued, the Court has no power to allow the amendment if the rights of third persons will be thereby affected."

The case of *Davidson v. Cowan,* 12 N. C., 304, is fully in point. The plaintiff brought a suit against the defendant to recover certain slaves which he purchased at execution sale, and pending the suit he obtained a rule upon the defendant to show cause why the sheriff should not amend his return to a writ of *fi. fa.* against one David Cowan, which issued 21 June, 1810, returnable to the ensuing term. The facts were that the writ came to the sheriff's hands 4 October, 1810, who levied it upon the negroes and returned the *fi. fa.* without endorsing the levy. Before the next term of the Court the defendant in the execution died. An *alias fi. fa.* was issued, whose test overlapped his death, and the negroes were sold under it to the plaintiff, who brought his action against a subsequent claimant. To validate the sale it was necessary to amend the return so as to show that the levy was made prior to the death of the defendant in the execution, and to use the evidence in the pending suit. The amendment was made and the defendant appealed. In reversing the order, *Hall, J.,* said: "It was error, because an alteration was made at the instance of one who was not a party to the record, and because it might injure the rights of third persons who held under the record as it originally stood. For the negroes were not levied upon, as appeared from the sheriff's return, under the first execution, but were sold under that which issued after the death of the defendant in the execution; therefore, the amendment would validate the sale, and of course affect the title of the subsequent claimant." *Purcell v. McFarland,* 23 N. C., 34; *Bank v. Williamson,* 24 N. C., 147.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Perry v. Adams, 83 N. C., 269; *Williams v. Weaver,* 101 N. C., 2.

(585)

J. Y. and W. H. BRYCE v. JOHN T. BUTLER.

1. A sues B for assisting C to remove from the State, alleging such removal to have been for the purpose of defrauding C's creditors, of whom A was one. The declaration of C, contained in a letter to A, is not evidence against B, unless the complicity of B and C be established *aliunde*, and such declarations cannot be received to prove such complicity.

2. Because the presiding Judge, after objection, permitted the plaintiff to read the body of a letter which was unimportant and irrelevant, is no reason that he should permit the reading of the postscript, which was relevant, upon the ground that when *part* of a declaration is received as evidence the party is entitled to have the *whole* thereof go to the jury.

Civil action, tried at the Special (July) Term, 1873, of the Superior Court of Mecklenburg, before *Moore, Judge.*

The plaintiff, as a creditor of one Groot, brings this action, alleging that the defendant assisted Groot to remove from the county for the purpose of hindering and defrauding his creditors.

A few days before Groot left the county he made a deed of trust or mortgage to the defendant, conveying all his household furniture, provisions, etc., worth nearly $1,000, and which afterwards sold at the sheriff's sale for $750, professedly to secure $1,000, as money advanced to Groot by defendant, and fixing therein the time of foreclosure at twelve months from the date of the deed. The property thus conveyed was left in the house in possession of Groot's wife, who remained behind after he left, which he did soon after making the deed, upon the night train going south, saying to one Glover, his clerk, that he was going to Charleston and Augusta and would return in a few days, and giving instruction at the same time about his business during his absence.

A short time after Groot left the defendant sent to take possession of the furniture and other property, which (586) at first was objected to by Mrs. Groot; she, however, afterwards consented and the defendant removed it, with the exception of a bed and furniture, a set of china and some other articles.

Among other things, plaintiff insisted that the mortgage was fraudulently made to cover the property and keep off creditors and was so intended by Groot and defendant. He, the plaintiff, proved that Butler, the defendant, had said to one creditor, who wished to know if there would be enough property left to pay him a small debt, that there would not. To the plaintiff, the defendant claimed the whole amount of $1,000 was due, and also to the sheriff, who had claims in his hands against Groot. That upon an attachment afterwards sued out and levied upon the property the defendant only claimed $285 for a watch and chain sold by him to Groot at the date of the mortgage.

The defendant testified that he never claimed at any time but $285 for a watch and chain and a small balance on his books. That he had told the plaintiffs and others the mortgage was for $1,000, but he did not know what the property was worth, as he had never seen it; that he never told any one his debt was over $285; that the mortgage was taken for $1,000 with a view to future purchases, Groot being a liberal trader, etc.

Further, for the purpose of proving complicity between Groot and the defendant the plaintiff offered in evidence a letter from Groot to him. This evidence the defendant objected to, but his Honor allowed it to be read. Its contents being irrelevant it is unnecessary to copy it. The postscript of the letter was pertinent, and his Honor would not permit it to be read. Plaintiff excepted.

Guion, with whom was *Vance,* for appellants.
Barringer and *Dowd, contra.*

READE, J. In order to prove that the defendant (587) "aided and assisted Groot to remove from the State, to defraud the creditors of said Groot," of whom plaintiff was one, the plaintiff offered in evidence the declarations of Groot, which were, as plaintiff alleged, to that effect.

Take it to be that the declarations were to that effect, plainly or in so many words they were clearly incompetent upon a very plain principle.

Admitting that plain principle, the plaintiff says he takes his case out of the general rule that hearsay is not evi-

(588) dence, by having, by other evidence, proved a complicity between Groot and the defendant; and then, what one said was the same as if said by the other. That is a plain principle also. But it is equally plain that the declarations cannot be used to establish the complicity. And here it is expressly stated that the declarations were offered "further to prove complicity," etc.

The declarations offered were contained in a postscript to a letter from Groot to the plaintiff. The defendant objected to the letter as evidence, the case states, but his Honor permitted the plaintiff to read the body of the letter, which was unimportant, and ruled out the postscript which contained the declarations which the plaintiff desired to introduce. And then the plaintiff says, that having been permitted to read a part, that is, the body of the letter, he ought to have been permitted to read the whole, upon the principle that when a *part* of a declaration, or conversation, or transaction is given, the *whole* must be. That principle is usually applied when one party introduces a part and leaves out a part; the other party is entitled to call for the whole. But here the letter and postscript were offered by the plaintiff; and it is a perversion of the principle to say that because he got in a part which was irrelevant, that entitled him to put in the remainder which was incompetent; when, under the objection of the defendant, the whole was incompetent. Another view is presented by the plaintiff: When the fact of complicity is established by other evidence, then the declarations of one are evidence against the other. And when the complicity is established, so as to let in the declarations, is a primary question to be decided by his Honor; and his decision cannot be reviewed; and that here he must have decided the complicity to be established, else he would not (589) have permitted the letter to be read. This argument is fatal to the plaintiff who used it; for the fact that he allowed the body of the letter which was immaterial to be read proves nothing but the fact that he rejected the postscript which was important and was clearly competent if the complicity had been established, proves that his conclusion was that the complicity was not established. And so, if the plaintiff's position is correct, that his Honor's decision of the primary question cannot be reviewed, then, just as we could not review it if in favor of the plaintiff, as he supposes, so we cannot review it if it be against him, as we have to suppose.

There is no error.

Per Curiam. Judgment affirmed.

L. D. TRIPLETT and wife v. W. P. WITHERSPOON and others.

Since the passage of the Act of 1840 (chapter 50, Rev. Code), a purchaser of land with notice at the time of a former fraudulent conveyance is not protected in his purchase, although he paid value therefor.

(*Hiatt v. Wade*, 30 N. C., 340, cited and approved).

Civil action for the recovery of a tract of land and for damages for its detention, tried before *Mitchell, Judge,* Fall Term, 1873, of the Superior Court of Caldwell.

The following is the case as made up and amended by the counsel of the parties, and as settled by the presiding Judge, and transmitted as part of the record to this Court.

In support of the allegations in his complaint the plaintiff offered evidence tending to show that in April, 1861, Manly Barnes, the father of the *feme* plaintiff, the wife of the plaintiff Triplett, executed and delivered to her a deed in fee-simple for the land which is the object of this (590) controversy; that the consideration expressed in said deed was $200, but that nothing was paid. About twelve months after the delivery of this deed the grantor therein, the said Manly Barnes, executed and delivered to one John Witherspoon and Sarah H. Dula, and also the intestate of the defendant Clarke, a deed in fee for the same land for a valuable consideration; that before the said John Witherspoon bought said land and accepted his said deed, he had notice of the deed before that made to the said Louisa, the wife of the plaintiff Triplett.

Plaintiff further showed that about the time Witherspoon received his deed for the land, he, the plaintiff, went off to the army, and that during his absence Witherspoon obtained possession of the land, though the *feme* plaintiff had theretofore received the rents for the same for one or two years; that since the surrender and close of the war, the wife of the plaintiff, and grantee in the first deed, as above stated, has become insane and has destroyed many of the valuable papers of her husband, and that the deed from her father to her for this land has been lost or destroyed since 1868 or1869, and that the same was never registered.

The plaintiff testified that at the time the deed was made to his wife he did not know that Barnes, her father, owed any debts; that he thought at the time, that the deed was a *bona fide* gift of said land to his wife. Other witnesses testified that at the time the deed was made to the plaintiff's wife Barnes was considered solvent.

Defendants offered evidence tending to show that Barnes at the time of the conveyance to his daughter made another deed to her for another tract of land, which, with the tract in question, was all the land he owned; that he was then a man of middle age, with a wife and four or five children, some of whom were small; that he retained possession of said land until Witherspoon bought and took possession of the same; that Barnes was largely indebted when he made (591) the deed to his daughters; and that after the close of the war he had, with the consent and knowledge of the plaintiffs, mortgaged one hundred acres, being the remainder of the same tract he had sold to Witherspoon, to P. and A. H. Horton, to secure a debt he owed them, and which he subsequently sold to the Hortons with the knowledge and consent of the plaintiffs, who joined with him in the deed. That at the time of this sale to the Hortons, Barnes had said in the presence of the plaintiffs that the deed to the *feme* plaintiff was of no effect and a sham, for he had made it to avoid a debt which he owed as surety for one Anderson, and a debt which he owed to one Howell and another, for some negroes; that he, Barnes, had received to his own use, with the consent of the plaintiffs, a large part of the purchase-money paid by the Hortons.

It was admitted that John Witherspoon was dead, and that the defendants, Witherspoon and Dula, were his heirs at law, and that the defendant Clarke was his administrator. That Clarke had obtained an order to sell the land in controversy for assets and had sold the same, and that the defendant

Winkler was the purchaser; said sale had been confirmed by the Court, though the plaintiff Triplett testified that he had no notice of the proceedings until after the land was sold.

Plaintiffs' counsel, among other things, asked, in writing, his Honor to charge that "although the jury believe that Barnes at the time of making the deed to the plaintiff, his daughter, had the purpose to defraud his creditors, and that the *feme* plaintiff knew of this purpose, yet these facts would raise no such trust for Barnes as could be enforced by him or any one who purchased from him with knowledge of the execution of the deed to his daughter.

His Honor refused this instruction, but charged the jury that if there was an agreement at the time the deed was made that the land should be used for the purposes of Barnes, and sold by him whenever he pleased, that the plaintiff could not recover.

Plaintiffs further asked his Honor to instruct the jury that the instructions asked in the foregoing prayer would be true although the jury should believe that (592) at the time the daughter accepted the deed, she agreed with her father to hold said land for his use. This the Court also declined to give.

Defendants asked his Honor to give the following instructions to the jury, which was done, and to which the plaintiffs excepted:

"If the jury believe that the deed was made by Barnes to his daughter, the *feme* plaintiff, on a secret trust that she was to hold the legal title for the use and benefit of Barnes, then plaintiffs could not recover."

"That if it was understood between Barnes and his daughter, that the paper though signed and sealed and put into the possession of the daughter, was not to be a deed, the plaintiffs could not recover."

Defendant's counsel excepts to the foregoing statment in this: The evidence was that Witherspoon heard a witness say that Barnes had drawn and signed a deed; but there was no evidence that he knew Barnes had parted with the possession of the paper; nor any evidence that his daughter, the alleged grantee, received any rents. The evidence was that Barnes continued in possession all the time; at least, there was no change of possession, and Barnes paid all the taxes.

Defendants' counsel did not recollect that his Honor refused to give the first instruction asked by the plaintiff, or that such was asked. His recollection was that it was admitted that Witherspoon claimed as a purchaser, and that his Honor refused to allow an issue as to fraud on creditors to be inserted. Further, Triplett, the plaintiff, did not swear that on his return from the army the deed was in his wife's possession, but in the house in which she and Barnes, her father, were living, he, Barnes, never having been out of the possession of the land.

This amendment his Honor in settling the case adopted.

There was a verdict for the defendants. Motion for a new trial granted and discharged. Judgment and appeal by the plaintiffs.

Armfield, for appellants.
Folk, contra.

PEARSON, C. J. His Honor erred in giving the (595) instruction, "if the jury believe that the deed was made by Barnes to plaintiff Louisa, on a secret trust that she was to hold the legal title for the use and benefit of Barnes, plaintiff could not recover."

This secret trust was void, and would not have been enforced by the Courts, because the purpose was to defraud creditors and purchasers, and such a trust is not fit to be executed.

It follows that the plaintiff Louisa had the legal title subject only to the rights of creditors and purchasers under 13 and 27 Elizabeth. There are no creditors in this case; so 13 Elizabeth is out of the plaintiff's way.

Witherspoon was a purchaser for valuable consideration, but he had notice of the conveyance by Barnes to the plaintiff Louisa, and under the Act of 1840 he is not protected against this conveyance, although it was erroneous and made with a secret trust for the purpose of fraud.

This matter is settled by *Hiatt v. Wade,* 30 N. C., 340, where a construction is put upon the Act of 1840, and the alteration in regard to 27 Elizabeth is so clearly stated that I will adopt the language of *Chief Justice Ruffin:* "The statute, 27 Elizabeth, enacts that conveyances of land made with intent to defraud purchasers shall, only as against purchasers for good consideration, be void; under that act it was of course held that notice of the fraudulent deed did (596) not impeach the title of the purchaser; because the bad faith of the deed vitiated it, and with notice of the deed the purchaser had also notice of the fraud. But the Legislature thought proper in 1840 to alter the law and declare that no person shall be deemed a purchaser within the meaning of the former act unless he purchase the land for the full value thereof, *without notice* at the time of his purchase of the conveyance alleged by him to be fraudulent."

This language is as precise and positive as can be.

Error.

PER CURIAM. *Venire de novo.*

Cited: Triplett v. Witherspoon, 74 N. C., 476; *Bank v. Adrian,* 116 N. C., 549; *Pass v. Lynch,* 117 N. C., 455; *Brinkley v. Spruill,* 130 N. C., 48.

WILLIAM C. BRYAN v. C. H. FOWLER and others.

Plaintiff sent his cotton to defendants' gin-house to be ginned; while there the gin with all the cotton in it was consumed, it not appearing how the fire originated: *Held,* that the destruction of the cotton by fire was not *prima facie* evidence of negligence; and further, it being shown that the defendants, during the possession of the plaintiff's cotton, used ordinary care, they are not liable for its loss.

(*Heathcock v. Pennington,* 33 N. C., 640; *Ellis v. Railroad,* 24 N. C., 138; *Herring v. Railroad,* 32 N. C., 402; *Scott v. Railroad,* 49 N. C., 432; *Chaffin v. Lawrence,* 50 N. C., 179; *Smith v. Railroad,* 64 N. C., 235, cited, commented on and approved).

CIVIL ACTION for damages arising from burning plaintiff's cotton, tried before *Clarke, Judge,* Fall Term, 1873, of PAMLICO Superior Court.

All the facts necessary for an understanding of the case as decided are fully set out in the opinion of the Court.

The jury returned a verdict for the defendants. Judgment in accordance therewith and appeal by the (597) plaintiff.

Haughton, for appellant.
Seymour, contra.

READE, J. The plaintiff stored his seed cotton in the gin-house of the defendants, to be by them ginned at a convenient time, and the gin-house and cotton were destroyed by fire. This was a bailment for the mutual benefit of bailor and bailee, and the liability of the bailee is for ordinary care. 2 Parson Con., 139.

Ordinary care is that degree of it which an ordinarily prudent person would take of his own. *Heathcock v. Pennington,* 33 N. C., 640.

It did not appear how the fire originated or what was the cause of it, and the plaintiff insists that proof of the destruction of the cotton by fire is *prima facie* evidence of negligence. The principal authority relied on for that position is *Ellis v. R. R.,* 24 N. C., 138. In that case the plaintiff proved that his fence was fifty feet from the railroad and that sparks from the engine set it on fire; and that although it had been there for a long time it had never caught fire before, and that the engine usually had a spark catcher, but it did not appear whether it had one on that day. There was no other evidence by the plaintiff, and the defendant offered none. It was held to be *prima facie* negligence. Of course it was. There was the plain fact that the defendant had set fire to the plaintiff's fence, which the prudent use of his engine had never fired before. That made it necessary for the defendant to show that he had used the same care on that day as had been used theretofore. If he had proved that the engine was supplied with a spark catcher and that the usual care was used, the decision would have been the other way. *Judge Gaston,* delivering the opinion, says: "We think, therefore, that the instruction asked for by the defendant was abstractly correct, viz.: that the company are (598) not liable for an injury like that complained of, if they use all the care to prevent it which the nature of their business allows; but we also think, that as no evidence was offered to show what care they did use, there was no foundation laid for asking the instruction." It is plain, therefore, that in that case the decision was against the defendant, because he did not show that the usual care was used. That case was reviewed in *Herring v. R. R.,* 32 N. C., 402, where the engine ran over a slave who was asleep upon the track. The plaintiff proved the injury in this as in the fence case, and yet the Court said: "In this case the cars had been running for years without injuring a slave, because no slave had fallen asleep upon the track. That was itself an unusual circumstance and repels any inference of negligence from the mere fact that damage was done, and therein this case differs from the cases of the fence and the house, which had remained stationary." Both the foregoing cases are again reviewed in *Scott v. R. R.,* 49 N. C., 482, and *Chaffin v. Lawrence,* 50 N. C., 179, in which the distinction is drawn between injuries to things remaining under the same circumstances inanimate and stationary and things having volition and locomotion. In the latter cases negligence is not inferred from the fact of injury, but negligence must be proved by the plaintiff who alleges it. And this is the general rule. *Smith v. R. R.,* 64 N. C., 235.

It remains now to apply these principles to the case before us. This case differs from all the cases cited in this: In the cases cited it was proved that the defendant did the act complained of; in this case it does not appear who did it, or how it originated. At 1 o'clock in the day, when the gin was running, and all the hands present, the cotton in the press, in the gin-house, was discovered to be on fire, and immediately caught in the lint room, and being very inflammable, almost like powder, it was impossible to extinguish it. And now the plaintiff insists, that inasmuch as the gin-house had been in operation for a considerable time, and under the same circumstances, and was stationary, and had (599) never burned down before, like the fence case, it makes a *prima facie* case; first, that the defendant burned it, and second, that he did it negligently, without allowing any force to the fact that it was his own gin-house that was burned. When we hear that a man's house has been burned, by which he suffers loss, the inference is that he did not burn it, but that it was the result of accident, or the work of an incendiary. And it is hard to believe that he did not use ordinary care of his own. But grant that the fence case applies, and that it was incumbent on the defendant to show that he did use ordinary care; then it appears that he did show it. He proved that it was general orders, that "no fire, pipes or matches" were to be allowed in the gin-house, and that none were used. What more could he prove? The only fact relied on by the plaintiff, other than the fact of burning, was that sometimes the hands working about the cotton would go into the engine-house to warm, with lint cotton on their clothes, and the engineer, as a precautionary measure, would singe it off.

The hand that attended the lint room says that on the day of the fire he went to work at 6 o'clock in the morning, and about 7 o'clock he went into the engine-room, and was singed off. That he stayed out about a quarter of an hour and then went back to his work. There was no evidence that any fire remained on him. If it had, and he had set fire to the lint cotton, it would have flashed immediately. Yet the hands all went to dinner at 12, and remained away until 1 o'clock, and after they returned at 1, this hand did not go into the lint room, nor up stairs where the lint room was, as the superintendent proved. The only hand that did go up stairs was the hand that attended the gin. The first he saw of the fire it was in the lint room, and it spread so rapidly that he had to run to save himself.

The engineer said that he stayed to watch while the hands went to dinner; and that after they came back he first discovered the fire in the press, and he immediately ran
(600) up stairs and found the whole upper floor in flames.
If, therefore, it was negligence to singe the cotton off the hands, yet as the fire did not originate in that way, it amounts to nothing in this case.

From all the testimony, it is a mystery how the fire occurred. Take it that the fact of burning made a case of *prima facie* negligence so as to put it upon the defendant to show proper and usual care, still we think he did prove due care.

The evidence raises some suspicion that a friction match may have been carried to the gin-house, in seed cotton, as hands picking out cotton are known to use matches in the fields. And there was some probability that the seed cotton in the gin-house took fire spontaneously; as it is known that greasy cotton is liable to spontaneous combustion, and mashing the seed will grease the cotton.

But however this may be, there is no evidence of negligence against the defendant, except the fact of the fire, and *that* he has met by showing that the usual and proper care was used.

Negligence being a question of law, and we being of opinion that there was no negligence, and the jury having found rightly for the defendant, it is not necessary that we should notice in detail the prayers for instructions, and the exceptions to his Honor's charge, because whatever errors he may have committed, and we do not say that he committed any, the verdict is right, and that is enough. *Chaffin v. Lawrence,* 50 N. C., 179.

No error.

PER CURIAM. Judgment affirmed.

JOHN R. HASKINS v. F. A. ROYSTER.

1. Any third person who, without lawful justification, induces a party who, for a consideration, has contracted to render personal service to another, to quit such service and refuse to perform his part of the agreement, is liable to the party injured in damages.

2. That the consideration of a contract is too small, or its terms unreasonable, will not justify a court, for the benefit of a third person not a party thereto, in setting such contract aside; nor is the fact that one of the contracting parties is appointed to decide as to the performance or non-performance of certain conditions a sufficient cause for annulling and setting aside the same.

READE and SETTLE, JJ., dissenting.

CIVIL ACTION to recover damages for enticing away laborers, heard before *Tourgee, Judge,* at Spring Term, 1873, of PERSON Superior Court.

In his complaint the plaintiff alleges that he had employed certain laborers, naming them, to work on his farm during the year 1871, under written contracts; and that while they were at work according to the terms of said contract, the defendant, in March of that year, unlawfully enticed and persuaded said laborers to leave his, the plaintiff's, employment, and unlawfully harbored and detained them for the space of ten months. For this plaintiff demands damages, etc.

The case states that after hearing the evidence on both sides, and before the case was left to the jury, his Honor decided that the plaintiff was not entitled to recover upon his complaint filed. To which ruling plaintiff excepted, submitted to a nonsuit and appealed.

W. A. Graham, with whom was *J. W. Graham* and *McCorkle & Bailey,* for appellant.

(604) RODMAN, J. We take it to be a settled principle of law that if one contracts upon a consideration to render personal services for another, any third person who maliciously, that is, without a lawful justification, induces the party who contracted to render the service to refuse to do so, is liable to the injured party in an action for damages. It need scarcely be said that there is nothing in this principle inconsistent with personal freedom, else we should (605) not find it in the laws of the freest and most enlightened States in the world. It extends impartially to every grade of service, from the most brilliant and best paid to the most homely, and it shelters our nearest and tenderest domestic relations from the interference of malicious intermeddlers. It is not derived from any idea of property by the one party in the other, but is an inference from the obligation of a contract freely made by competent persons.

We are relieved from any labor in finding authorities for this principle by a very recent decision of the Supreme Court of Massachusetts, in which a learned and able Judge delivers the opinion of the Court. *Walker v. Cronin,* 107 Mass., 555.

That case was this: The plaintiffs declared in substance that they were shoemakers and employed a large number of persons as bottomers of boots and shoes, and defendant unlawfully and intending to injure the plaintiff in his business persuaded and induced the persons so employed to abandon the employment of the plaintiff, whereby plaintiff was damaged, etc.

A second count says that plaintiff had employed certain persons named to make up stock into boots and shoes, and defendant well knowing, etc., induced said persons to refuse to make and finish such boots and shoes, etc.

Third count is not material to be noticed.

The defendant demurred. The Court held each of the counts good.

I shall make no apology for quoting copiously from this opinion, because the high respectability of the Court, and the learning and care with which the question is discussed, make the decision eminently an authority.

"This (the declaration) sets forth sufficiently (1) intentional and willful acts, (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) actual damage and loss (606) resulting."

"The general principle is announced in Com. Dig. *Action on the case A.* In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. The intentional causing such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong." See *Carew v. Rutherford,* 106 Mass., 1, 10, 11.

"Thus every one has an equal right to employ workmen in his business or service; and if by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated, may be held liable for the wrong, although he did it for the purpose of promoting his own business."

"Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria,* unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to."

"It is a familiar and well-established doctrine of the law upon the relation of master and servant, that one who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, provided there exists a valid contract for continued service known to the defendant. It has sometimes been supposed that this doctrine sprang (607) from the English statute of laborers and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant, and that it applies to all contracts of employment, if not to contracts of every description."

In *Hart v. Aldridge,* Cowp., 54, it was applied to a case very much like the present.

In *Gunter v. Astor,* 4 J. B. Moore, 12, it was applied to the enticing away of workmen not hired for a limited or constant period, but who worked by the piece for a piano manufacturer.

In *Shepperd v. Wakeman,* Sid., 79, it was applied to the loss of a contract of marriage by reason of a false and malicious letter claiming a previous engagement.

In *Winsmore v. Greenbank,* Willes, 577, the defendant was held liable in damages for unlawfully and unjustly "procuring, enticing and persuading" the plaintiff's wife to remain away from him, whereby he lost the comfort and society of his wife, and the profit and advantage of her fortune. *Barbee v. Armstead,* 32 N. C., 530.

In *Lumly v. Gye,* 2 El. & Bl., 216 (20 Eng. L. & E., 168), the plaintiff had engaged Miss Wagner to sing in his opera, and the defendant knowingly induced her to break her contract and refuse to sing. It was objected that the action would not lie, because her contract was merely executory, and she had never actually entered into the service of the plaintiff; and *Coleridge, J.,* dissented, insisting "that the only foundation for such an action was the statute of laborers, which did not apply to a service of that character; but after full discussion and deliberation it was held that the action would lie for the damage thus caused by the defendant."

To the same effect are *Jones v. Jeter,* 43 Geo., 331, and *Salter v. Howard, Ib.,* 601, in both which cases the servants enticed were employees in husbandry. The only case to the contrary that we are aware of is *Burgess v. Carpenter,* 2 Rich. S. C., 7; but the authorities relied on in that case seem to us not in point. And although this action is not brought under our Act of 1866 (Bat. Rev., ch. 70), (608) yet that act is evidence of the common law.

It is suggested (for we did not have the benefit of an argument for the defendant) that in the present case the contract between the plaintiff and Eastwood and Wilkerson is unreasonable and therefore void. We cannot suppose it to be contended that this Court, or any Court, when there is no suggestion of fraud, can inquire whether the reward agreed to be paid to a workman is the highest that he might have got in the market, and to declare the contract void, or to make a new one if thought not to be the highest. No Court can make itself the guardian of persons *sui juris.* That would be an assumption inconsistent with their freedom. We suppose the objection to point to that part of the contract which is, in substance, that if either party of the second part, or any person for whom they contract, shall misbehave *in the opinion of the party of the first part,* such misbehaving party shall quit the premises *and forfeit to the party of the first part* all his interest in the common crop.

It is said that these provisions make the plaintiff a judge in his own cause, which the law will not allow, and that they are manifestly so oppressive and fraudulent as to avoid the whole contract. This proposition will be found on examination to go much too far even as between the parties to the contract, and to have no application as between one of the parties and a malicious intermeddler, as the defendant must, in this stage of the case, be considered.

It is not necessary to decide what would be the effect of such a stipulation in an action on the contract between the parties to it. But as there seems to be some misconception of the law of such a case, and as although there are numerous authorities on the question, it is not yet of "familiar learning" in our Courts, a few observations will more conveniently lead us to the question actually presented.

The authorities are conclusive that the parties to a contract, if there be no fraud or concealment of the interest, may agree to make a person interested, or even (609) one of the parties an arbitrator to decide all controversies which may arise under the contract, and such agreement will be valid and effectual.

In Watson on Arbitration (85), it is said: "It seems that it is no objection to an award that the arbitrator was a party, or interested in the matter submitted, provided that the party objecting, at the time of the submission knew that the arbitrator was so interested; as in the case when Sergeant Hards took a horse from my Lord of Canterbury's bailiff for a deodand, and thereupon the Archbishop brought his action, and by a rule of Court it was referred to the Archbishop to set the price upon the horse; the sergeant afterwards sought to set aside the award, on the ground of the interest of the Archbishop; but it was denied by *Lord Hale,* and *per totam curiam.* Comb., 218; S. C., 4; Mod., 226; Hard., 43; 1 Inc. & W., 511. See also, Russel on Arbitration, 108. In Morse on Arbitration, it is said that a person interested or partial is incompetent to act as an arbitrator (p. 100). But the parties may, if they choose, waive the objection. "They are at liberty to select a person interested or a person prejudiced, a relation, or an enemy of either of them. *Strong v. Strong,* 9 Cush., 560; *Fox v. Hamilton,* 10 Pick., 275. See also, Morse, 108. The most important case on this question, however, is *Ranger v. Great Western Railway Co.,* 5 H. L., 72. There it was agreed between the plaintiff, who contracted to build the road, and the company, that Brunel, who was the engineer of the company, and a large shareholder in it, should be the judge of the amount and value of the work done. The *Lord Chancellor,* after saying that Brunel was the mere agent of the company, and in effect the company itself, continues: "It does not appear to me to be necessary to institute any minute inquiry as to how far the calculations of Mr. Brunel were accurate. *I think it quite enough if they were bona fide,* and with the intention of acting according to the exigency of the terms of the contract. The company expressly stipulated that during the progress of the (610) work, the decision of the engineer, as to the value of the work, should be final. If the appellant thought this a harsh or oppressive clause he ought not to have agreed to it. It does not, however, seem to have been unreasonable." To the same effect are *Elliott v. Southdown Railway Co.,* 2

De Gex & Sm., 17; *Hawley v. N. S. Railway Co., Id.,* 33; *Kimberly v. Dick,* 13 Eq. Cases, 1.

The case of *Ranger v. Great Western Railway Company,* also holds that penalties and forfeitures upon a contractor, provided for in case the work be not properly done, or done in due time, are reasonable, and will be enforced, even to the great loss of the careless or dilatory contractor.

These authorities unquestionably establish that such stipulations are not void or voidable, even as between the parties, and it has never been supposed or contended that they made the whole contract void; as even if void themselves, they are clearly separable from the other parts. Either party, therefore, could maintain an action on this contract.

It is important, however, to notice that none of these authorities goes to the length of holding that if after the contractors had duly performed all or a part of the work, the plaintiff had *mala fide,* or without lawful cause, discharged them, they could not recover upon the contract. The contrary is implied in the language of the *Lord Chancellor* in *Ranger v. Great Western Railway Co.,* and is evidently most consistent with reason and justice. The power attempted to be reserved cannot have any greater effect than to make the discharge *prima facie* lawful, if so much as that.

Contracts with such stipulations as we find in the present are not to be commended as precedents. Such stipulations are unusual; they answer no useful purpose, and suggest an intent (perhaps in this case untruly) to take some improper advantage, and to exact from the employees a degree of personal deference and respect beyond that civil and courteous deportment which every man owes to his fellow in every relation in life. To this extent, a mutual duty is implied in every contract which creates the relation of master (611) and servant. If the servant fails in due respect, the master may discharge him, and so, if the master fails, the servant will be justified in quitting the employment.

Again it is suggested, that the contractors of the second part in this contract are *croppers* and not servants. By cropper, I understand a laborer who is to be paid for his labor by being given a proportion of the crop. But such a person is not a tenant, for he has no estate in the land, nor in the crop until the landlord assigns him his share. He is as much a servant as if his wages were fixed and payable in money.

It is unnecessary to discuss the question whether one who maliciously persuaded a *tenant* to abandon his holding, would not be liable in damages for such officious intermeddling.

But whatever may be the effect of the provisions commented on, as between the parties to the contract, the authorities are clear and decisive that a person in the situation of the defendant can take no advantage from them. As the case now stands, he cannot pretend to play the part of a chivalrous protector of defrauded ignorance. For the present, at least, he must be regarded as a malicious intermeddler, using the word malicious in its legal sense.

There is a certain analogy among all the domestic relations, and it would be dangerous to the repose and happiness of families if the law permitted any man, under whatever professions of philanthropy or charity, to sow discontent between the head of a family and its various members, wife, children and servants. Interference with such relations can only be justified under the most special circumstances, and where there cannot be the slightest suspicion of a spirit of mischief-making or self-interest.

To enable a plaintiff to recover from one who entices his servant, it is sufficient to show *a subsisting relation of service,* even if it be determinable at will. In *Keane v. Boycott,* 2 H. Bl., 511, the plaintiff sued a recruiting officer for enticing his servant. The servant was an infant and had been a slave in St. Vincents, where he indentured himself to serve the plaintiff for five years. The indenture of course was (612) void upon a double ground, but the Court held the plaintiff entitled to recover. *Eyre, C. J.,* says: "The defendant in this case *had no concern in the relation between the plaintiff and his servant; he dissolved it officiously,* and, to speak of his conduct in the mildest terms, he carried too far his zeal for the recruiting service." In *Sykes v. Dixon,* 9 Ad. & El., 693, that case is distinguished from *Keane v. Boycott,* upon the ground that the servant had quitted his master before the defendant employed him, and there was then no subsisting relation of service. In *Evans v. Walton,* 2 C. P., 615 (E. L. R.), it was held not necessary to show a valid and binding contract for service, but only the existence of the relation. If the servant was one at will, the action could be sustained. *Salter v. Howard,* 53 Ga., 601, is to the same effect.

We are of opinion that the complaint sets forth a sufficient cause of action.

The judgment is reversed and the case remanded to be proceeded in, etc. Let this opinion be certified.

PER CURIAM. Judgment reversed.

READE, J., dissenting. I cannot agree with the majority of the Court, and the subject is of such general concern and of so much importance that I must depart from our usage to allow the opinion of the majority to pass as the opinion of all in matters of minor importance.

I do not deny that in some sense every one who renders service for another is that other's servant; but I do deny that in every such case the *relation of master and servant* is established. The child is servant of the parent, the wife of the husband (and why not the husband of the wife?), the lawyer of his client, the physician of his patient, the pastor of his church, etc. And so the mechanic who contracts to build my house, and the teacher who contracts to teach my children, and every one who contracts to do anything for me, is, in some sense, my servant; and my correspondent is my "most humble servant." But none of these fall under the well-defined and well-known title of master and servant. Every layman understands that there is such a relation, just as there is the relation of husband and wife. And every lawyer when he desires to know what constitutes that relation and what are its incidents, looks under that head, and if he looks under any other head, it is only for analogies. Blackstone says: "The three great relations in private life are, first, that of *master and servant;* second, that of *husband and wife;* third, that of *parent and child.* And the law makes a fourth, that of *guardian and ward.*" In discussing these relations, he says: "I shall first consider the several sorts of servants, and how this relation is created and destroyed. The first sort of servants therefore acknowledged by the laws of England are *menial servants,* so-called from being *intra menia* or domestics. The contract between them and their masters arises upon the hiring." (613)

This is an ancient servitude, embracing duty, subjection and allegiance on the part of the servant, and superiority and power on the part of the master. Bac. Ab. Master and Servant. And these characteristics, modified by times and circumstances, always distinguish the relation of master and servant; and Mr. Graham's brief refers us to the decalogue, fourth and tenth commandments, as showing that such were the characteristics of servitude in those days.

Quoting again from Blackstone: "Another species of servants are called apprentices (from *apprendre,* to learn), and are usually bound for a term of years by deed indented, or indentures, to serve their masters, and be maintained and instructed by them."

Servitudes of this kind were at first formed by the parties themselves, or by their parents or friends acting for them. But subsequently the overseers of the poor, or other proper authorities, bound out poor children as apprentices. The incidents to the relation of master and apprentice were, on the part of the apprentice, service and subjection; and on the part of the master, power, instruction, protection (614) and maintenance. The mode of apprenticing by indentures of the parties was at common law, and the binding by the overseers of the poor was by statute; and *we* have had similar statutes.

It is not pretended that any such relation as I have described exists in the case before us. There is no other relation of master and servant known to the common law. How then can the relation in this case be that of master and servant? Take it that there is a contract of service—hard enough in its terms—yet there is wanting the element of protection and maintenance on the part of the plaintiff, which is indispensable to create the relation of master and apprentice. If, therefore, any of the many authorities cited in the learned opinion of the majority in this case are founded on the relation of master and servant which I have been considering, they are inapplicable. There are, however, relations of master and servant in England other than those which I have been considering.

Quoting again from Blackstone: "A third species of servants are *laborers*, who are only hired by the day or the week, and do not live *intra menia* as part of the family; concerning whom the statutes before cited have made many very good regulations: 1. Directing that all persons who have no visible effects may be compelled to work. 2. Defining how long they must continue at work in summer and in winter. 3. Punishing such as desert their work. 4. Empowering the justices at sessions or the sheriff of the county to settle their wages; and 5. Inflicting penalties on such as either give or exact more wages than are so settled."

There are many of these statutes in England, regulating almost every species of trade and labor, with very stringent terms against the laborers and servants, as well as against the masters, and innumerable decisions have been made under these statutes, and neither text writers nor judges have always been careful to distinguish between cases under the statutes, and not under the statutes. Such cases are not authority here, because we have no such statutes. And yet is very evident that the complaint is based (615) upon the learning and cases under those statutes. It begins by setting out that the alleged servants "bound themselves as laborers." And charges that the defendant did *"harbor and detain them."* Evidently going upon the idea that the relation of master and servant existed.

Having divested the case of the supposed character of master and servant, I propose now to consider it as it is, a contract between the parties.

I do not deny what is said in the learned opinion of the majority that if there is a contract between A and B for any purpose, and C induces B to violate the contract to the injury of A, A has his action against C for damages. Not upon any idea of master and servant, however. In the leading case from Massachusetts, put by my learned brother, where the shoemaker was induced to break his contract, the learned Judge puts it upon the ground of breach of contract. And so it was where the actress was induced to refuse to fulfill her engagement. There was no relation of master and servant. And the reference to it is only for the analogy.

The relation of master and servant was never supposed to exist between Barnum and Jennie Lind, nor between Strakosch and Neillson. But still I admit that if a third person had induced these *queens,* not *servants,* of song, to violate their contracts, such third person would have been liable in damages.

But I do not admit that to induce one to violate a contract is *per se* actionable, as it is the relation of master and servant or master and apprentice. In order to make it so there must be *damage*. And the damage must be specifically charged and proved. There is no charge of damage. Damages are *"demanded"* but none are *charged* to have been sustained. There must be a *per quod* in all such cases. Here there is none. In the Massachusetts case, which leads and is made the basis of the opinion of the majority, the learned Judge enumerates four requisites to sustain the action, which the declaration must contain, and which the declaration in that case did contain:

"1. Intentional and willful acts.

"2. Calculated to cause damage to the plaintiffs in their lawful business.

"3. Done with the unlawful purpose to cause such damage."

(616) Now grant, for the sake of the argument, that the complaint in this case contains the three first requisites, although I do not think it does, yet the fourth requisite is wholly wanting.

"4. Actual damage and loss resulting."

In regard to this last requisite, which is the gist of the whole matter, and without which there can be no recovery in any such case, there is no allegation whatever. In the Massachusetts case each count in the declaration contained the *per quod:* "Whereby the plaintiff lost the services, etc., and all the advantages and profits, etc., and incurred large expense to procure other suitable workmen, etc., and were compelled to pay much larger prices, etc., and have been hindered in their business to a large extent, etc., from which they would otherwise have realized large profits," etc. And the second count: "Whereby their stock of leather was greatly damaged, and they were compelled to pay much higher prices," etc. And so in the other count. If all this was necessary in that case, which is the basis of this, why is it not necessary in this? It is necessary in every case, and no case can be found in England or America where it has been held otherwise. It is common learning, and doubtless was overlooked in the learned opinion of the majority because we had no argument on the part of the defendant, and other points were made prominent as the *only* points by the learned counsel for the plaintiff.

2. The contract is not binding upon the laborers because of fraud and imposition apparent on its face.

That Eastwood and Wilkerson are ignorant is apparent from the fact that they make their mark to the agreement. That they are poor, is apparent from the fact that they have no homes. but have to live on the lands of the plaintiff, and they have neither teams nor tools with which to make a crop; and that they are dependent, is apparent from the fact that they stipulate against their "insolence" and that of all their family, towards the plaintiff and all his family, without requiring like stipulations from the plaintiff; (617) and from the fact that they put it in the power of the plaintiff, at any time during the year, to turn them out of their houses, and take to himself the whole of their labor and crop; and that, not alone for unfaithfulness in their business, but for what he or any of his family may be pleased to consider disrespectful behavior to him, or to any of his family, in no way connected with their business—the mere flout of a child, it may be. And that the plaintiff used his power over them fraudulently, to circumvent them, is apparent from the fact that he took from them such an unconscionable agreement.

The plaintiff's counsel informed us that his researches had found but one case where a contract had been resisted at law as unconscionable; where a grain of rye had been promised for the first day, increasing every day in geometrical progression for a considerable time, when it was found that there was not as much rye in all the world. There is another kindred case, where a horse was shod for a penny for the first nail, and increasing for every other nail, in geometrical progression. These cases are too remote and comical to be of any practical use, but the books are full of cases where courts of equity, as we are now, have relieved against contracts founded in fraud and circumvention, and where equity refuses to enforce contracts which have the element of hardship or unfair advantage. In order to meet this view of the case, the opinion of the majority estimates that although the contract stipulates that Haskins has everything in his own hands, and he is to do whatever "suits" him, yet if he were to discharge the laborers without good cause they might have their action against him. But then the opinion fritters the right away to nothing, because it goes on to argue and cite authorities to show that a man may be judge or arbitrator in his own cause; and besides, what poor remedy is a lawsuit for these laborers who have neither time nor money to spare. The only security against such contracts is for the courts utterly to ignore them.

And yet, instead of ignoring this contract the most (618) important principles are subjugated to sustain it. It is made the case of master and servant without the element of maintenance on the part of the master; and in order to sustain the stipulation for the arbitrary will of the plaintiff to govern all, the wholesome rule that no one shall be judge in his own case is subordinated.

3. But the gravest objection to the contract is that it is against public policy.

If Eastwood and Wilkerson had contracted in so many words to be the *slaves* of the plaintiff, it would be conceded to be against public policy and void. But here is a condition worse than slavery. If slaves, he would have been entitled to their services and could have enforced their good behavior and punished their insolence, but he would have been obliged to feed and clothe them and provide them shelter. But here he stipulates for their services and for their good behavior, and that they shall feed and clothe themselves and leave their homes at his bidding, leaving to him the results of their labor. And then, if any third person shall entice them away from such a contract and furnish them employment by which they can live, he claims to recover of such person damages. It is plain to see that if such contracts were allowed, society would soon be disorganized, with the worst results both to employers and laborers. There is no greater danger in any community than a dependent class upon whom is the hand of oppression bearing hard and who have nowhere to look for relief. Consider who these parties are, and their condition. The plaintiff is a land owner. He agrees with two laborers, one white and the other colored, to furnish them land, teams, etc., and they are to cultivate the land and the crop is to be divided between them. Such relations have always existed in the State. They have never been called master and servant, but landlord and tenant, lessor and lessee, cropper or partners, according to the contract. There has never been anything degrading in any of these relations; public policy requires that there should not be. The State has no greater interest than that all her citizens, laborers (619) and employers alike, should have the spirit, behavior and independence of manhood. Now turn to this contract. "The said Eastwood and Wilkerson agree to work faithfully all the year, and cause their hands to do the same; they are to work wholly by the orders and directions of said Haskins at all times, and should any of the above-mentioned hands fail to work to *suit* the said Haskins he has the privilege to discharge them at any time he may think proper." This would seem to be strong enough to secure to Haskins all that he ought to have expected, the right to discharge them at any time if they failed to work to *suit him.* But the contract goes on: "The hand or hands discharged losing all their labor and time done by them on the farm of said Haskins, and leave the plantation immediately, the said Haskins drawing their proportionate part of all the crops." Surely that was enough, but it proceeds: "Should any of the said hands be, in the judgment of said Haskins, insolent to said Haskins, or disrespectful to him or any of his family, the said Haskins has the privilege of discharging said hands at any time, the said hand discharged losing all the labor rendered by him." No one can read the contract without being satisfied that the best interests of society forbid that it should be enforced or in any way countenanced in the courts. It bears upon its face the evidence that the plaintiff intended to get the labor of these men and discharge them and keep their earnings. And then what could they do? Men with families, the year gone, and all their earnings gone. The alternative is the poorhouse or crime and the jail.

What would be the condition of society if every contract was of this character? And if one may be, all may be. On the first of November the plaintiff might drive off the laborers and their families and keep all their earnings; and then for the winter they would be without shelter, food or raiment; they would be paupers, and every community must support its paupers. And every government must provide for its paupers, and to prevent pauperism every prudent government regulates the relations of masters and servants and masters and apprentices. And as labor is always more or less (620) dependent in most countries thickly populated, they have statutes regulating labor. In England they have "laborers' statutes" regulating almost every species of labor, with a view to the protection of both employer and laborer. And I think no case can be found in England or America where such a contract as this is authorized by statute or supported by the courts. Indeed, I do not know that it can be fairly inferred from the opinion of the majority in this case that this contract would be supported if the controversy were between the plaintiff and the laborers. I think it would not.

4. This brings me to the only other point. It is said that even if the contract is such as the laborers may violate it with impunity, yet the defendant is a malicious intermeddler, and does not stand upon the same footing with the laborers. I admit that it is of much importance to the best interests of society that valid contracts of every kind, and especially those between employers and laborers, should be observed in good faith; and that officious intermeddlers should find no favor. But it is a rule of common sense, that what one may lawfully do, another may advise him to do. Yet I admit that there is respectable authority for saying, that where there is a voidable contract which one of the parties may violate with impunity, if a third person induces him to violate it he may be liable. The instance put is, where an infant is a party to a contract which is voidable by him, and a third person induces him to violate it, he is liable. And why should he not be? for the contract may be for the advantage of the infant; and both the infant and the public interested in its observance. But Mr. Smith, in his work, entitled Master and Servant, page 7, says: "But it has been held that a contract by an infant binding himself to serve during a certain time for wages, but enabling the master to stop the work whenever he chose, and retain the wages during the stoppage, is wholly void as not being beneficial to the infant." For which he cites *Reg. v. Lord,* 12 Q. B., 757. Observe the difference between void and voidable contracts.

Under the new regime much of the labor of the (621) country is performed under contract. This is the first case which has been before us in which the incidents of the relation of employer and laborer have been under discussion, and will probably be looked to as a precedent. I think it of great importance that employers should make only just and reasonable contracts; that laborers should be faithful on their part; and that third persons should not intermeddle. If either of these classes violate their plain duties they will find no favor. What I say for myself, I think I may say for this Court, and for all courts. Only to prevent a contrary influence is the aim of much that I have said.

Cited: Jones v. Stanly, 76 N. C., 356; *Morgan v. Smith,* 77 N. C., 38; *McElwee v. Blackwell,* 94 N. C., 264; *Holder v. Mfg. Co.,* 135 N. C., 395

STATE v. JOHN ALLEN KETCHEY.

1. The Act of 1868-'69, chap. 272, and the act amendatory thereof, 1871-'72, chap. 15, authorizing the Governor of the State to appoint special terms of the Superior Courts, are not unconstitutional; and in appointing such special terms the Governor is not bound by the certificate of the Judge, so far as to confine such terms to the trial of a particular class of cases.

2. It is not necessary that a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried.

3. Because of a juror's being first cousin to the prisoner is no good cause of challenge by the prisoner, unless it be shown that ill-feeling or bad blood exists between the juror and the prisoner.

4. A witness may be allowed to express his opinion as to the state of mind of another witness during certain periods; and it is not necessary that such witness should be an expert or a physician.

(*State v. Perry,* 44 N. C., 330; *State v. Baker,* 63 N. C., 279; and *State v. Henderson,* 68 N. C., 350, cited and approved).

INDICTMENT for rape, tried before *Albertson, Judge,* at Special (August) Term, 1873, of ROWAN Superior Court.

The objection taken to the rulings of his Honor, and the

points raised on the trial below, are fully set out in
(622) the opinion of *Justice Settle.*

The prisoner was found guilty. Motion for a new trial; motion refused. Judgment and appeal.

Jones & Jones and *Craige & Craige* and *J. M. McCorkle,* for the prisoner.

Attorney-General Hargrove and *Bailey,* for the State.

SETTLE, J. The learned counsel for the defense have made many exceptions, not only to the constitutionality and regularity of the Court which tried the prisoner, but also to the rulings of his Honor on the trial.

As some of these exceptions were abandoned, and others not pressed in this Court, we shall notice only such as were urged and which seem to require some comment.

1. It is insisted in view of Art. IV, sec. 14, of the Constitution, that the Legislature had no right to pass the Act of 1868-'69, chap. 273, and the amendatory Act of 1871-'72, chap. 15, under which the Governor appointed the special term of the Court at which the prisoner was tried.

2. And further, that if said acts are constitutional, yet as *Judge Cloud* had only certified to his Excellency that there was such an accumulation of *civil* actions in the Superior Court of Rowan County as to require the holding of a special term for the disposal of such *civil* actions, he had no power under the acts in question to issue a commission to a Judge to hold a Court for the trial of both *civil* and *criminal* actions.

We see no conflict between the Constitution and the acts in question, and if indeed there were some apparent conflict, we should feel ourselves bound, after recognizing the validity of Courts of Oyer and Terminer and special terms, in the most solemn cases, not to disturb a very convenient and beneficial method of dispensing justice.

Upon the second branch of the objection it is sufficient to
say that the Governor is not bound to follow the cer-
(623) tificate of the Judge; and that there is nothing in
the acts to prevent the Governor, after cause is laid
before him to justify a special term, from exercising his dis-

cretion as to the extent of the jurisdiction for the trial of actions he may see fit to confer on such special terms.

We have held, since the adoption of our present Constitution, in *State v. Baker,* 63 N. C., 279, and also in *State v. Henderson,* 68 N. C., 350, that a Court of Oyer and Terminer, held under the act of 9 February, 1862, is a Superior Court, and is not repugnant to the Constitution.

After a verdict of guilty the prisoner's counsel insisted that the Court could not legally try the prisoner, because he had not prior to this special term been arraigned, and no issue had been joined at a precedent regular term of the Court.

After what has been said it would seem unnecessary to add anything further in support of the powers of special terms, but we will quote section 3 of the Act of 1868-'69, *supra,* which declares that "the special terms of the Superior Courts held in pursuance of this act shall have all the jurisdiction and powers that regular terms of the Superior Courts have."

By this we must understand that such special terms have all necessary jurisdiction and powers to dispose of such business as may be authorized to be heard under the commission constituting the Court.

This interpretation is consistent with the Constitution and all the acts of the General Assembly on the subject, and enables the Governor to authorize just such courts as the exigencies of the case may require.

We now come to the exceptions made to the rulings of his Honor in the progress of the trial.

1. A first cousin of the prisoner was tendered as a juror, when the prisoner challenged him for cause, but the only cause assigned was the relationship existing between them.

This would undoubtedly have been a good cause of challenge on the part of the State, but was it so for the prisoner? We think not. *Lord Coke* says that relationship is a good cause of principal challenge, no matter how (624) remote soever, for the law presumeth that one kinsman doth favor another before a stranger. 3 Thomas' Coke, 518. And the same doctrine is held in *State v. Perry,* 44 N. C., 330.

The prisoner does not say that his cousin is his enemy.

Had such cause been assigned and found to be true, the juror should have been rejected. Family feuds are apt to be very bitter.

2. One Monroe Miller testified that he thought he saw the prisoner on the day of the alleged rape at an hour which would render it highly improbable that he could have done the act at the time stated by the prosecutrix.

A witness was then offered by the State, who testified, after objection by the prisoner, that he knew Miller well; that he had lived with him, and that at certain periods of the month said Miller did not seem to be right in his mind, whilst at other times he was rational, and that at the period alluded to he seemed to be dull and his ideas and statements confused. The prisoner objects because the witness was allowed to give his opinion as to the state of Miller's mind.

It is said in *Clary v. Clary,* 24 N. C., 78, there are facts which from their nature exclude all direct positive proof. No man can testify, as of a fact within his knowledge, to the sanity or insanity of another. Such a question when it arises must be determined by another than direct proof, and in that case the opinion of a witness as to the testator's state of mind was held to be competent evidence.

This position is supported by 1 Gr. Ev., sec. 441, where it is said that insanity belongs to that class of facts which, from the very nature of things, must be proved by the opinion of witnesses.

And the cases establish the position that it is not necessary that the witnesses to prove sanity or insanity should be physicians or experts.

(625) 3. The third and last exception is, that his Honor permitted witnesses to say that they had seen the prisoner about the time when a horse and a cow and a trunk were stolen.

But the record further states that reference to the stolen property was allowed by the Court, and so stated at the time of its admission, alone to fix the date of the prisoner's presence in the county; and in his Honor's charge to the jury he directed them to regard this evidence for the purpose solely of fixing dates and to give no other weight thereto.

When evidence is irrelevant and calculated to mislead or prejudice a jury, it is error to receive it, but we cannot say that it was irrelevant to show that the prisoner was in the county at a certain time, and the jury could not have been misled or prejudiced by this evidence, when his Honor, both at the time of receiving it, and in his charge, gave such full and clear explanations as to its purport and effect. For illustration: It becomes material to show that A was in the city of Raleigh on a certain day; may not B testify that although he cannot fix the day of the month, yet he is sure that he saw A in the city on the day that C was killed? And then may not D be allowed to fix the exact date of the death of C? In all this there is no imputation on the character of A. We are not to presume that juries are so ignorant as not to understand plain instructions, or so corrupt as to disregard proper instructions. After a careful examination of the whole record, in favor of life, we are forced to the conclusion that there is no error.

Let this be certified, etc.

PER CURIAM. Judgment affirmed.

Cited: S. C., 71 N. C., 147; *McLeary v. Norment,* 84 N. C., 236; *Whitaker v. Hamilton,* 126 N. C., 471.

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(626)

EDMUND JONES v. THE NORTH CAROLINA RAILROAD COMPANY.

Where the plaintiff's horse was in his pasture, through which the defendant's road ran, and was run over in the day-time by one of the engines of defendant, it appearing on the trial that the horse, before being struck, ran some two hundred yards on the track, and that there was nothing to prevent the engineer from seeing him, and that no alarm was given by the engineer until about the time the horse was run over: *Held,* that there was such negligence on the part of the engineer as would make the defendant liable in damages for the injury to the horse.

CIVIL ACTION to recover damages for killing a horse, tried before *Moore, Judge,* Special (July) Term, 1873, of the Superior Court of MECKLENBURG.

The evidence tended to establish the following facts:

The horse of the plaintiff was struck by one of the defendant's freight trains soon after sunrise; that the track at the place where the accident occurred was slightly down-grade and straight for a half mile or more, so that the animal could have been seen for that distance by the engineer coming in the direction the train was then running. From the tracks of the horse it appeared that he had run ahead of the train at a rapid pace for about two hundred yards, leaping a very wide cattle guard; that at the point where the horse commenced running there was a cut which gradually deepened in the direction the train was going, to the depth of some five feet, and was preceded immediately by a fill extending to the creek bridge; that the animal was struck about fifty yards from the bridge, where the fill was from five to eight feet high.

The plaintiff, a colored man, was standing in sight of the train as it passed but did not see the horse; he knew the signals used on the trains, having been himself employed on the road, and that the whistle blew for brakes and the train stopped for a moment only. He, the plaintiff, went immediately to the place where the train stopped, and found the horse had been struck and its leg cut off. The whistle (627) did not blow the alarm. The horse, the night before, had been turned into the inclosed field, through which the road of defendant runs, to pasture.

Defendant asked the Court to charge that, as the action was not brought within six months of the alleged injury, it was incumbent upon the part of the plaintiff to prove that the wrong complained of was the result of negligence on the part of the defendant; and that according to the evidence, in law, negligence was not established.

His Honor declined to give the instruction asked, but on the contrary instructed the jury that if the evidence was believed, negligence was established, and that the plaintiff was entitled to recover.

The jury returned a verdict for the plaintiff. Judgment accordingly, and appeal by defendant.

R. Barringer and *Wilson & Son,* for appellant.
Guion and *Vance & Dowd, contra.*

READE, J. The horse was pasturing in his owner's (the plaintiff) field, through which the defendant's road ran.

How or when the horse got upon the road does not appear. His tracks indicate that he ran before the train two hundred yards. It was day-time and the road was straight. There was nothing to prevent the engineer from seeing the horse, and therefore it is to be taken that he did see him. The alarm whistle was not blown at all, and the whistle for the brakes was not sounded until about the place where the train struck the horse, whether just before or just after striking does not appear.

We agree with his Honor that this was negligence.

There is no error. Judgment here for plaintiff.

PER CURIAM. Judgment affirmed.

Cited: Doggett v. R. R., 81 N. C., 465; *Wilson v. R. R.*, 90 N. C., 74.

STATE v. DAVID MARTIN.

When, on the joint trial of two prisoners for murder, the presiding Judge directs the acquittal of one, remarking at the time, "I shall direct an acquittal as to him, although I think it not improbable that he was there," the other prisoner not being in any manner prejudiced by such remark, has no right to complain and is not entitled to a new trial.

INDICTMENT for murder, tried Fall Term, 1873, of NEW HANOVER Superior Court, before *Russell, Judge.*

The prisoner was indicted with two others for the murder of Willie Carter. The facts and the evidence are contained in the following statement of the presiding Judge sent to this Court as part of the record.

THE CONFESSIONS OF DAVID MARTIN, MADE TO JESSE J. CASSADY, THE EXAMINING MAGISTRATE.

He says: "Between the hours of 1 and 2 o'clock, on Monday last, I and Jimmie Anderson and William Hooper and Willie Carter, the deceased, started for Smith's creek to go in swimming, and when about half way between the Union Depot and the creek we sat down on the railroad track. While sitting on the track Jimmie Anderson took out of his pocket a two-bladed corkscrew knife which had the point of one blade broken off. Stopped and sharpened the knife on the iron rail, remarking that he always wanted his knife sharp, so that he could cut anybody that aroused his angry passions. After sharpening the knife, the boys got up and proceeded to the creek and when near the thicket one of them cut a club about fifteen inches long and one and a half inches in diameter, which he carried along.

"Arriving at the place where they intended to go in swimming they found it unsuitable to the purpose; so they went farther up the creek, through a blind path, and through an undergrowth, to a spot where they would have a better opportunity of committing the deed without the fear of (629) discovery while in the act.

"Willie Carter and one of the boys stripped off and plunged into the water; Jimmie threw Willie's hat into the water, which he (Willie) swam after and secured. They next threw his clothes in, which he also swam after, and in attempting to get ashore was jumped on and repeatedly shoved under until he was nearly drowned, and when he reached the shore was pulled on the bank by him (David). Willie spread his clothes in the sun, and while waiting for them to dry Jimmie Anderson, with knife in hand, made an assault upon Willie and attempted to cut him. Willie resisted, and finally threw the boy off, remarking as he did so that he did not like such fun. In a few minutes thereafter one of them struck him with a club in the forehead, which stunned him, and he staggered towards the bank of the creek and Jimmie and William shoved him in the water. They then tied the legs of his pants, which they filled with rocks, and threw over his neck. The boys then sat on the bank of the creek (with the exception of David, who lay on the hill out of sight) and watched the boy fifteen minutes, until the last bubbles were seen to rise."

Dr. W. W. Lane, being duly sworn, deposes and says:

"I was called on to make a *post-mortem* examination of Willie Carter; found the head in a contused condition, the tongue hanging out of the mouth, terribly lacerated. I found the arm off close to the shoulder, with about two inches of the humeris and head in the socket. Arm was missing. Was forty or fifty hours between death and the time of examination. The body was mutilated by a smooth clean cut, and must have been made with a knife. There was a small gash, a diagonal cut on the thigh. The whole head and face was severely bruised, evidently by a dull instrument. I did not cut into the skull, as the evidence of foul play was so evident. Made no examination to see if deceased was drowned. The body had the appearance of being choked, and the head bruised. The left arm was removed; the (630) bone was broken, and an irregular fracture."

Upon his cross-examination, Dr. Lane said: "I would not like to say whether the boy was drowned or murdered first. I did not make a careful examination. My opinion is he was *drowned first;* though he might have been beaten and drowned simultaneously."

There was much evidence tending to show the guilty participation of the boy David in the homicide, which it is not deemed necessary to report. But *all* the evidence as to the *means* and *manner* of the homicide is herein stated.

Oliver Kelly, was sworn as a witness, and testified as to the confessions of the prisoner David; to the effect that David stated that he went into the water with the deceased, and that he pushed Willie under the water until he was nearly dead. That he and one Elijah Martin held his arm while *one Duke* cut it off with a hatchet. David also said that he himself held Willie's head under the water until he was nearly strangled. David also said that Jimmie Anderson struck him with a stick, they having got into a fight *about a biscuit.* In another statement made by David Martin, he said the body of Willie Carter was not mutilated until after his death, and the body had been drawn up out of the water after his death. He also stated, when examined by the Justice, that Willie was standing on the bank close to the river, facing the water, when the boys, Jim Anderson and Billy Merrick, shoved him in the creek and drowned him.

It was also in evidence that in a statement subsequent to those above given, David stated that Elijah, whom he had implicated by his previous statements, was not present at all, had nothing to do with it, and upon being asked why he had charged Elijah with it, said he did not know why he did it, that he just lied about it. And several witnesses testified to an *alibi* as to Duke, who had been implicated by the statement of the prisoner David. In some of David's statements which were in evidence, he described the place where (631) the homicide was done, and his description was confirmed by numerous witnesses who examined the place.

In the course of the trial the boys, David, Jim and Billy Merrick, being at the bar, on trial, when the State rested its case the counsel for the prisoner Billy Merrick moved that the Court direct a verdict of not guilty as to him, and that he be discharged upon the ground that there was no evidence against him to go to the jury. The Court said that there was nothing whatever in the State's case showing the guilt of the prisoner Billy Merrick, except the confessions of his co-defendants, which were not evidence against him. "Therefore," said the Judge, "I shall direct an acquittal as to him, although I think it not improbable that he was there." To this remark of the Court, the prisoner David excepts. The remark was made as to Billy. Counsel for prisoners argued to the jury that, according to the evidence, the homicide, if committed at all by the prisoners (which was denied), was upon a sudden fight, and, therefore, manslaughter.

This argument that was made to the jury, "That if the defendants were guilty *at all* they were only guilty of manslaughter, was based upon the confessions that were made by Jimmie Anderson, which showed a certain fight, which resulted in the death of the deceased, and not from any confessions or statements that were made by David Martin."

The Court charged the jury that if the deceased came to his death by a blow with the stick or by other means occurring upon a sudden quarrel, and in a sudden fight, which deceased had contributed to bring about, then it would be manslaughter, and not murder; but that if the jury believed that the killing was accompanied by the circumstances of teasing and tantalizing the deceased, and then mutilating the body in the atrocious manner described by witnesses, that this would indicate the existence of malice. Prisoner prayed the Court to instruct that if deceased came to his death by being drowned, then the prisoners cannot be convicted. In response to which the Court charged that it was true the bill of indictment did not charge a drowning, and that the law required the prosecution to establish the death by the same or like

means as those charged in the bill. And, there- (632)
fore, if they believed the death was from drowning,
the variance would be fatal, but that it was for them to say how deceased was killed. That there was evidence of blows, stricken by a stick, and of a fight between the boys; that the doctor had stated that he could not tell whether deceased was drowned or killed and then thrown in the water; that the severe bruises, found on the body, the doctor thought might have been put there before submersion in the water, though he expressed the opinion that he was strangled by water, or, in other words, drowned; that it was submitted to them to say whether the death was by drowning, "in which case prisoners were entitled to a verdict," or by bruises from the striking, pushing and kicking, as charged in the bill, or by bruises caused by beating, scuffling or holding under the water, or by both or all of these means, or by blows with a stick, in either of which cases there would be no variance sufficient to defeat the indictment.

The prisoner was found guilty. Judgment of death, and appeal.

No counsel in this Court for the prisoner.
Attorney-General Hargrove, for the State.

BYNUM, J. The prisoner, David Martin, with one Jim Anderson and Bill Merrick, was on trial for the murder of one Willie Carter. After the evidence for the State was closed the counsel of Merrick moved the Court to direct a verdict of not guilty to be entered as to him, upon the ground that there was no evidence against him to go to the jury. The Court remarked that there was nothing in the State's case showing the guilt of the prisoner Merrick, except the confessions of his co-defendants, which were not evidence against him. "Therefore," said the Judge, "I shall direct an acquittal as to him, although I think it not improbable that he was there." This was excepted to by the counsel of
the defendant Martin. It is not seen how Martin (633)
could be prejudiced by the remark of his Honor that
Merrick was probably there, meaning at the place of the homicide, for the remark conveyed no opinion of the Court to the jury of Martin's guilt. It was fully proved and not

denied in the argument, that Martin was present at the time and place of the homicide, and his defense was rested, not upon an *alibi,* but upon the ground, first, that he did not commit the deed, and second, if he did, that it was not murder, but only manslaughter. So, even to put the most unfavorable construction upon the remark of the Judge, as intimating an opinion that not only Merrick, but Martin, also, was there, it would be only affirming what the prisoner himself admitted, and did not deny.

This was the only exception. The Court gave the prisoner the benefit of the instructions asked, to-wit, that if the deceased came to his death by drowning, the jury must acquit, because the indictment contained no count for killing by drowning, and to convict, the jury must be satisfied that the deceased came to his death in one of the modes described and charged in the indictment.

We have carefully examined the whole record and find no error.

PER CURIAM. Judgment affirmed.

Cited: State v. Hunter, 94 N. C., 835.

JOHN NORFLEET, administrator of DAVID COBB, and others, v. ELISHA CROMWELL.

1. When, upon the petition of one or more parties, under the Act of 1795 (Rev. Stat., chap. 40), leave was granted by the County Court to cut a canal across the land of another for the purposes of drainage, the petitioners and their assignees, upon the report of the jury provided for in said act being confirmed, acquire not merely an easement, but title in fee to the land condemned.

2. The right of the State to condemn land for drains rests on the same foundation as its right in cases of public roads, mills, railroads, school-houses, etc. The acts granting such powers are not unconstitutional.

3. Where a covenant is not to be performed on the land, but concerns it, the covenant will be enforced against an assignee of the covenantor with notice.

4. If the party from whom an assignee purchases cannot complain of an alleged misuser of an easement, the assignee cannot, as he stands in the shoes of him from whom he purchased.

(*Norfleet v. Cromwell,* 64 N. C., 1, cited and commented on).

CIVIL ACTION upon a covenant of defendant's assignor, tried Spring Term, 1873, of EDGECOMBE Superior Court, before *Moore, Judge.*

All the facts pertinent to the points decided are set out in the opinion of the Court.

The jury, upon the issues submitted to them by the presiding Judge, found a verdict for the plaintiffs. Judgment in accordance therewith, and appeal by defendant.

J. L. Bridgers, Jr., for appellant.
No counsel *contra* in this Court. (636)

RODMAN, J. These are the facts material for the present purpose as gathered from the pleadings and verdict.

In January, 1855, Eaton Cobb and the plaintiff Harrell were in the possession and use of a canal lying partly on their own lands and partly on the lands of others, of whom the defendant was one. It passed near to, but did not touch two pieces of land then belonging to one Gregory, which upon his death descended to Lloyd, after whose death the defendant purchased them from his devisees.

In 1855 the defendant owned certain lands, which he still owns, which lie below the lands of the plaintiffs, and at or near the mouth of the canal. The lands which he purchased from the devisees of Lloyd also lie below those of plaintiffs and are separated from the canal by intervening strips of land which, in 1855, belonged to the defendant, and still do. One of these strips is thirty feet and the other three hundred and fifty yards wide.

On 25 January, 1855, Cobb and Harrell entered into a covenant with a number of other persons, by which they were allowed to drain into the canal several pieces of land, not mentioned in the proceedings in the County Court of Edgecombe (presently to be mentioned more fully), under which Cobb and Harrell acquired their right to the canal. This covenant provided that each party might determine what work was necessary at any time to be done on the canal, and he was empowered to do it, and the other parties were to pay their several shares of the expense in propor-(637) tions which were fixed. It also provided on what terms other persons might be afterwards let into the use of the canal for drainage. It expressly stipulated that it should be binding not only on the parties themselves, but also on their heirs and assigns, *quoad* the lands specified in it. The defendant was no party to it.

On 29 July, 1858, the parties to the covenant of 1855 entered into covenant with Lloyd, by which it was agreed that he, his heirs and assigns, might drain his lands into the canal, provided it should not be entered at more than one point, by any ditch from one of the pieces of land. It provided that "all the rights and privileges, and all the burdens and duties conferred and imposed by the articles of agreement of 20 January, 1855, shall be enjoyed and borne by the parties to the agreement of 20 July, 1858," with certain alterations not material to the present purpose; it also provided the proportion of work to be done on the canal by Lloyd, his heirs and assigns.

On 10 December, 1860, the devisees of Lloyd conveyed his lands, referred to in the covenant, to the defendant, to hold to him and his heirs and assigns, with all the privileges, easements, appurtenances, rights, advantages, burdens, and encumbrances thereunto belonging and appertaining, etc.

After this deed was made, the intestate of plaintiff, Norfleet, did some work on the canal, and after a refusal by defendant to pay Lloyd's share according to the covenant of 1858 this action was brought to recover it.

The defendant professes not to dispute any of the doctrines upon which the decision of this Court went in a former case between the same parties arising out of the same matters. *Norfleet v. Cromwell,* 64 N. C., 1. He now puts his defense on matters not then appearing on the record, and it will be convenient to consider them successively.

1. He denies that Cobb and Harrell owned a canal in 1855. He admits that there was a canal situated as described, and through which the water from their lands actually flowed through his lands; but he denies that they had any rightful title to the easement. (638)

We think it unnecessary to consider what effect the actual enjoyment of the easement without a title would have on the present case, for we think that Cobb and Harrell did have a title.

At February Term, 1847, of Edgecombe County Court, they filed their petition against the present defendant and others, under the Act of 1795, Rev. Stat., chap. 40, setting forth in brief that they severally owned lands which could not be drained except through the lands of defendants, and praying for a jury to lay off a canal, etc. It was ordered accordingly.

At May Term, 1847, the jury returned that a canal as prayed for was necessary; prescribed its route minutely, and assessed damages to the owners of the lands through which it would pass. The report was confirmed, the damages were paid into Court, and the canal was cut.

As the law then stood the petitioners acquired not merely an easement but a title in fee to the lands condemned by the jury. No irregularity in the proceedings has been pointed out, and if any existed the defendant could not collaterally impeach the decree on that account.

The defendant takes higher ground, and contends that the Act of 1795 was unconstitutional, because it took his property *for a mere private purpose.* It is admitted that that cannot be lawfully done, and the only question on this point is as to the character of the purpose; whether it was to the benefit of one, or of a limited number of individuals only, or of such general and public utility as justifies a State in the exercise of its power of eminent domain.

It is well known that in the Atlantic section of this State there are hundreds of thousands of acres of what are called swamp lands, which from the flatness of their surface and the filling up of the natural courses of drainage, if any ever existed, cannot be relieved of the water which ordinarily covers them, and made fit for human habitation and (639) cultivation, except by cutting artificial canals from them into some convenient creek or river, which must necessarily pass through the intervening lands of the riparian proprietors. If these canals can be cut only by permission of the owners of the banks of the necessary outlets, this vast area of fertile land must remain for ages an uncultivated and unpopulated wilderness, and it will be entirely valueless to those who bought it from the State on the faith of its laws. An act which aims to remedy so great an evil, affecting so many persons now living, and so many more in the future, must be deemed one of general and public utility. In an agricultural view it now benefits the whole population of that part of the State in which these swamps are found. The right of the State to condemn lands for drains, rests on the same foundation as its right in cases of public roads, mills, railroads, cartways, school-houses, forts, light-houses, etc. In the case of public roads, it has never been doubted, and the weight of authority is decidedly in favor of its existence for the other purposes mentioned. Roads and aqueducts are classed together in the Institutes as servitudes of the same public character. In the swamps which the act in question chiefly affects, the canals are more important than the roads, as they must always precede them. The right to drain through the banks of a natural water-course is exactly similar in character to the right to construct dykes or levees to keep their excessive waters from overflowing the adjacent lands, a right which has been recognized in the legislation of all countries from the most ancient times. Witness the dykes which protect the coast of Holland, the fens of Lincolnshire, the lands on the Mississippi and on the Po. Both purposes are classed together in our Act of 1789.

The act in question, and others of a like character respecting mills, etc., are of ancient date. They have been incidentally sanctioned by this Court in many decisions, and if their constitutionality has never been directly affirmed, it may be because it was never questioned. These acts are not peculiar to North Carolina. Acts concerning mills, similar to ours, exist in many of the States, Washburn (640) Easements, 394 (329); and respecting drainage at least in Massachusetts (Gen. Stat., ch. 148), and New York (2 Rev. St., 548); *People v. Nearing,* 27 N. Y., 13 Smith, 306. The constitutionality of the Mill Acts has been sometimes questioned. Washburn Easements; *Tyler v. Beacher,* 44 Vt., 648. This last case cites the principal authorities, and quotes from *Cooley, J.,* in a Michigan case, to the effect that when the State reserves a control over the parties to whom the easement is given, the power of eminent domain may be lawfully used in their behalf. In the law we are discussing the State reserves such a control.

The canal is the private property of the petitioners, but all may acquire a right to drain into it on just terms, and their reciprocal duties may be regulated from time to time by the courts. We conclude that, both upon reason and authority, the natural water-courses of the country are *publici juris* for all purposes of general utility, whether of navigation, for public landings, two-paths, levees, or the outlets of canals.

2. The defendant contends that the covenant of Lloyd does not run with the land. His counsel endeavored to distinguish the present case from that in 64 N. C., 1, by reason that it appeared, or was assumed there, that the canal was, in part, situated on the Lloyd lands, when it appears now that it does not touch either piece, although it is near enough to them to affect them somewhat.

The language of *Lord Coke* in Spencer's case (1 Smith L. C., 23) does not require a physical touch. "But although the covenant be for him or his assigns, yet if the thing to be done be *merely collateral* to the land, and do not *touch or concern* the thing demised in any sort, there the assignee shall not be charged." In this case the thing to be done is to pay for work done on a canal which does not touch the land of the covenantor, but is to his benefit, and the way in which it was contemplated to obtain that benefit more fully and directly was by connecting the land with the canal by a ditch, which must, of course, touch the land; and it's not (641) being *in esse* at the time makes no difference when assigns are mentioned. Looking at the whole agreement, of which the covenant was a part, it is clear that it did directly *concern* the land.

Many cases have held that where a covenant is not to be performed on the land, but concerns it, the covenant will be enforced in equity against an assignee of the covenantor, with notice, as the defendant here is. *Tulk v. Moxhay,* 2 Phil., 776, 22 Cond. E. Ch. R.; 11 Bew., 571; *Western v. McDermot,* 1 Eq. R., 449; 2 Ch. Ap., 72; *Barrow v. Richard,* 8 Paige, 351; *St. Andrews' Church, appeal,* 67 Pa., 512.

Independently of this, however, there are two arguments which might be out of place in a mere court of law, but which a court of equity is entitled to notice, that must be considered conclusive of the question:

1. The consideration for the covenant was the grant of an easement which became appurtenant to the land, and passed with it to the defendant on his purchase. This easement he has accepted and enjoyed, and it is his only title to drain the land into the canal. The principle is generally conceded, and it is certainly equitable, that when the benefit and burden of a contract are inseparably connected, both must go together, and liability to the burden is a necessary incident to the right to the benefit. *Qui sentit commodum sentire debet et onus.* Notes to Spencer's case, 1 Smith L. C., 143; *Savage v. Mason,* 3 Cush., 318; *Coleman v. Coleman,* 7 Harriss, 100.

2. If Lloyd had obtained his right to drain into the canal by proceeding under the Revised Code, chap. 40, as he might have done, it is clear by section 13 that the obligation to contribute to repairs would have run with the land. When the same rights are obtained and the same burdens assumed by a contract which expressly stipulates that the burdens shall run with the land, there can be no reason why such a stipulation must be held unlawful and forbidden to have that effect. If Llyod had proceeded under the act, he might have made the defendant a party for the purpose of condemning his intervening lands; but defendant would not have been a party to that part of the proceedings which gave Lloyd (642) a share in the canal and adjusted his duties with the

other owners, for the defendant had no share in the canal and no concern in those matters.

3. Defendant contends that Cobb and Harrell had no right to permit strangers to the decree of the County Court to drain into the canal, whereby a greater quantity of water and sand has been brought down upon his lands than was contemplated in the decree, and that by such misuser of their rights they forfeited them.

1. The first answer which may be given to this proposition is, that the defendant is not in Court as the owner of the lands which he owned at the time of the decree, and which are the lands injured by the misuser, but as the assignee of Lloyd, and the whole issue is upon his liability *as such.* The Lloyd lands are not injured by the misuser, and that in other respects he is injured, is not pertinent to the issue. Besides, Lloyd could not complain of the alleged misuser. He derived his right from the new owners, and by his covenant with them admits their rightful ownership, and the defendant stands in Lloyd's shoes in respect to the Lloyd lands. If the defendant is damaged in these, by the omission of the parties to the covenant to repair the lower portion of the canal, the covenant points out his remedy. He may determine what repairs are necessary and do them, and compel contribution from the other parties.

2. Supposing, however, that the defendant can avail himself of a defense not open to his assignor, and assuming that the lands which he owned at the date of the decree are damaged by the misuser, is his remedy by defeating the present action?

The principle established by the authorities cited by the learned counsel we conceive to be this: If the owner of an easement over the land of another *unlawfully* enlarges it to the injury of the owner of the servient land, the easement is lost or suspended during the continuance of the misuser. Washburn, 538; *Jones v. Tapling,* 11 C. B. N. S., 283; *Wood v. Copper Miners Co.,* 14 C. B., 428; *Sharpe v. Hancock,* 7 Man. & Gr., 354.

In the last case the easement was a right to drain over the land of the defendant; the plaintiff altered that part of the drain which was on his own land so as to throw (643) an increased quantity of water into that part of it on the defendant's land, and *which the defendant was bound to maintain in repair,* thereby increasing his burden. In the present case, the defendant (independently of his liability as assignee) is under no obligation to repair. The conclusive answer to the defendant's proposition is this: The act of 1795 implicitly allows, and the Revised Code expressly provides, that strangers to the original decree may drain into the canal (sec. 9), and it would be absurd to hold that what may be done *in invitum* may not be done by the voluntary agreement of the parties. The possible future enlargement of the use of the easement was contemplated in the grant of it, and was therefore not unlawful. If, however, the defendant is damaged by such a change; if the capacity of the canal at its mouth is insufficient to vent the increased quantity of water flowing down, or if the owners of the canal neglect to repair it, so that the water spreads over the defendant's land, it is clear that he has a remedy.

The acts cited and the common law cast on the owners of the easement the burden of repair. Washington, 564; *Egremont v. Pulman,* Moody & M., 404; *Bell v. Twentyman,* C. B., 766. But a right of the defendant to damages for a breach of this duty would not relieve him from the present liability.

PER CURIAM. Judgment affirmed.

Cited: Brown v. Keener, 74 N. C., 717; *Winslow v. Winslow,* 95 N. C., 28; *Porter v. Armstrong,* 129 N. C., 104; *Porter v. Armstrong,* 134 N. C., 451.

N. H. STREET and others v. THE BOARD OF COMMISSIONERS OF CRAVEN COUNTY.

1. When a few of a class are permitted to sue for a whole class, and especially when permitted to sue for the public, they will not be allowed technical advantages which involve a breach of faith.

2. *Therefore,* it is no good defense to a suit on the bonds issued to pay for stock subscribed for by a county in a certain railroad that the agent authorized to make such subscription, instead of subscribing for the stock himself, purchased the same from a third person.

3. Nor is it a valid defense that the county issued its own bonds to pay such subscription instead of negotiating a loan, as empowered to do by the act.

4. When, by the act authorizing a county to subscribe for stock in a railroad, it is provided that such county may "levy such taxes annually as may be sufficient to pay the amount of such loan and interest thereon," the Board of Commissioners of the county have the power to lay a tax of two dollars on every one hundred dollars of property.

5. The equation of taxation provided for in Art. V, sec. 1, does not apply to taxes to pay a public debt existing at the adoption of the Constitution, or for special county purposes; nor does section 7 of the same article, forbidding counties to levy more than double of the State tax, apply to such debts.

6. Equity will enjoin no one to make an iniquitous defense: *Therefore,* a board of county commissioners are not compelled to plead the statute of limitations even when such plea would be a valid defense.

(*University Railroad Co. v. Governor,* 63 N. C., 410; *Simmons v. Wilson,* 66 N. C., 336; *Hill v. Comrs.,* 67 N. C., 367, cited and approved).

CIVIL ACTION, an application for an injunction to restrain the defendants from collecting certain taxes, heard before *Clark, Judge,* at chambers in Craven County, 13 December, 1873.

The first application for an order restraining the defendants from collecting taxes levied to pay the interest and part of the principal of certain bonds issued in 1854 to pay the county's subscription to the Atlantic and North Carolina Railroad, was refused by the Judge of the Third Judicial District, but the order was subsequently granted by *Judge Mitchell,* of the Tenth Judicial District, until the coming in of the answer. Upon the filing of the answer, exhibits and counter affidavits, his Honor dismissed the restraining order, and the plaintiffs appealed.

(645) All the facts relating to the points raised and argued in this Court are fully set out in the opinion of the Court.

Haughton, Justice and *Smith & Strong,* for appellants.
Lehman, contra.

READE, J. The facts found by his Honor below, and sent up to us, are substantially as follows:

Under an act of the General Assembly for the purpose, it was, in 1854, by proper proceedings in the County Court of Craven County, submitted to a popular vote of the qualified voters of the county, whether the county should subscribe for $150,000 of the stock of the Atlantic and North Carolina Railroad Company to aid in constructing the same. By a majority of six to one of the popular vote the subscription was ordered and was made.

To raise the money to pay the subscription, county coupon bonds were issued and sold; the money obtained, the subscription paid, and the road built. Up to the beginning of the war taxes were laid and paid by the people of the county to pay the interest upon the bonds. In 1873 a tax was laid to pay a portion of the principal and interest of these bonds. And the plaintiffs, who are a part of the taxpayers of the county, seek to enjoin the collection of the tax.

1. Because the agent of the county for making the $150,000 subscription did not make an actual subscription; but that another person made a large subscription for himself, and that the county agent *bought* the stock from such person, or at least the county subscription was substituted for his, to the amount of $150,000.

If this were true, it is a mere technicality which the plaintiffs would not be allowed to take advantage of. When a few of a class are permitted to sue for the whole class, (646) and especially when permitted to sue for the public, they will not be allowed technical advantages which involve a breach of faith. They will be confined to the merits of the case. What matters it to the county whether it got the stock by subscription in the first instance, or by taking the subscription of some one else, unless a premium had been paid, which is not pretended? And, besides, the alleged irregularity in making the subscription would not affect the validity of the bonds in the hands of an innocent holder. The *power* of the county to issue the bonds being conceded, irregularities do not affect them. But besides that, the subscription appears from the books of the Company to have been original and regular on the part of the county.

2. Because by the act aforesaid which authorized the county subscription, the county was authorized to negotiate a loan to pay the subscription, but was not authorized to issue its bonds to secure the loan.

What has been already said in regard to technical objections is applicable here. And besides, when the act authorized the county to negotiate a loan it authorized all the appropriate incidents to the loan; and bonds are not only usual, but necessary incidents.

3. Because the act aforesaid authorized the county to lay an *annual* tax to pay the loan by installments, and the Board of Commissioners have, in violation of the act, levied a tax of $2 on the $100 worth of property to pay the interest and a part of the principal.

We do not see how that violates the act. The act does not require the taxes to be laid annually to pay the loan in *equal* annual installments; but authorizes the county to "levy such taxes annually as may be sufficient to pay the amount of such loan and the interest thereon." And it appears that in 1855 the tax levied was 63 cents on the poll and 63 cents on the $100 worth of land, etc. Now the tax is a half cent on the poll and $2 on the $100 worth of property. This is a heavy tax on property; but if it is within the power of the Board of Commissioners to levy it, we cannot control their discretion. We suppose that the Board thought it (647) necessary by reason of the accumulation of interest during the war. The only inquiry which we can make is as to the *power* of the board.

4. Because the equation of taxation is disregarded, the equation being as much tax on the poll as on $300 worth of property.

That objection is well taken, if the equation of taxation in the Constitution, Art. V, sec. 1, applies to taxes for the payment of debts existing at the adoption of the Constitution. But in *University R. R. v. Holden*, 63 N. C., 410, it was held by all the Justices that the equation did not apply to taxes to pay the public debt existing at the adoption of the Constitution, or for special county purposes; see also *Simmons v. Wilson,* 66 N. C., 336.

5. Because the Board of Commissioners did not "liqudate and audit the accounts against the county, and direct the sums necessary to defray them," as provided in Acts of 1868-'69, chap. 20, sec. 8, subsec. 6, but levied $1 on the $100 worth of property to pay the coupons due on said bonds and payable after 1865, and other evidences of indebtedness, other than those named as due prior to 1865.

A sufficient answer to this is that there is no allegation that the debts stated do not exist, or that the levy is in excess of the amount due. And a further answer is that the section of the act quoted is not the one applicable to this case, but section 3, not quoted; which provides that the board shall "provide by taxation or otherwise for the prompt and regular payment, with interest, of any existing debt due by bond or otherwise, except a debt in aid of the rebellion."

6. Because of divers other allegations: such as that the Board of Commissioners met on the wrong day, and at the wrong place, and were partial and corrupt, which are denied in the answer, and are not sustained by the proofs.

7. Because some of the bonds are barred by the Statute of Limitations, and the Board of Commissioners will (648) not take the advantage. The answer is that this must be left with the board. And we know of no instance in which equity will enjoin one to make an iniquitous defense; nor would the defense avail them, if made.

8. Because the tax levied is more than double the State tax.

Article V, sec. 7, of the Constitution, which has that provision, does not apply to taxes for an existing debt. And if it had been so intended, it would be in conflict with the Constitution of the United States, as impairing the obligation of contracts. *Simmons v. Wilson, supra.*

The foregoing are the principal grounds urged by the plaintiffs for enjoining the collection of the taxes. There were others which are deemed unimportant. In a case lately before us, and a good deal like this, *Hill v. Comrs.,* 67 N. C., 367, we said: "There are divers other points in the complaint, which seem to be unfounded, and besides, they are unimportant. The main thing, the people's will, seems to have been fairly obtained. The stock was taken, bonds were issued, rights have vested, taxes have been levied, and a portion of the installments have been paid, and taxes are now laid to pay other installments. The Board of Commissioners, who may be supposed to represent the popular will, are anxious to meet the obligations incurred, and the Court will not allow technical and frivolous objections, calculated to impair the public faith, to avail a *few,* who are indulged with the privilege of suing for a *class.* Only their substantial rights will be considered."

What is there said is applicable here. Twenty years ago the people voted to subscribe the stock, and to borrow the money to pay for it; they got the money and built the road, and have had the benefit of it, and now have it. They have recognized the bonds and paid the interest and a part of the principal up to the war; and then further payment was suspended and the interest has accumulated. In the impoverished condition of the people it may be *hard* to pay now, but what can the Court do? They cannot relieve from contracts nor postpone their fulfillment. (649)

It is not necessary that we should, in this case, consider the extent of the power of the Court to enjoin the collection of taxes. They are necessary to the administration of government. Can we stop the wheels of government? The citizen must be protected against illegal taxes, it is true; but must he not seek his rights in some other form than by enjoining the whole tax list? There is no error in the order appealed from.

This will be certified, etc.

PER CURIAM. Order affirmed.

Cited: Haughton v. Comrs., ante, 467; *Uzzle v. Comrs., ante,* 565; *Brothers v. Comrs., post,* 727; *Trull v. Comrs.,* 72 N. C., 391; *Clifton v. Wynne,* 80 N. C., 147; *Bright v. Lennon,* 83 N. C., 189; *Barksdale v. Comrs.,* 93 N. C., 482; *Blanton v. Comrs.,* 101 N. C., 536; *Jones v. Comrs.,* 107 N. C., 259.

THOMAS A. DONOHO, administrator *de bonis non* of WILLIE JONES, v. DAVID PATTERSON and others.

1. In 1861, A, the heir at law of B, administered on his estate; in 1862, less than two years, A, as heir at law, agrees to sell certain lands belonging to the estate of B to C, receiving at the time the full value for it, but executed no deed for said land until the year 1864. In an action to sell this land for assets to pay B's debts: *It was held,* that, although the agreement to sell in 1862 might have been defeated by B's creditors, the deed to C from A in 1864 for the same land was valid.

2. *Held further,* that the act restraining the heir from selling the land of his ancestor within two years (Rev. Code, chap. 46, sec. 61) is not a statute of limitation which was suspended by the Act of 1861, chap. 4, nor is it affected by the Act of 1863, chap. 34, which provides that in computations of time for the purpose of applying any statute limiting any action or suit, or any right or rights, or for the purpose of raising a presumption, etc., the time elapsed since the 20th day of May, which was in the year 1861, or which may elapse until the end of the war, shall be excluded from the computation.

(*Hinton v. Hinton,* 61 N. C., 410; *Neely v. Craige, Ibid.,* 187; *Morris v. Avery, Ibid.,* 238, cited and approved).

SPECIAL PROCEEDING to sell real estate for assets, commenced in the Probate Court, and thence regularly (650) carried to the Superior Court of PERSON County, where it was tried before *Tourgee, Judge,* Fall Term, 1873.

The substantial facts are stated in the opinion of the Court.

The jury having found the issues submitted to them in favor of the plaintiff, his Honor gave judgment condemning the land to be sold for the payment of the admitted debts. From this judgment the defendants appealed.

W. A. & J. W. Graham, for appellants.
McCorkle & Bailey, contra.

RODMAN, J. The material facts are: Willie Jones (653) died in 1861. At April Term, 1861, of the County Court of Caswell, Walter Jones, who was his only heir, became his administrator. Walter duly administered the personal estate and afterwards left the State. He was duly removed from the administratorship and the plaintiff appointed administrator *de bonis non.* There are debts of Willie Jones outstanding and unpaid. The plaintiff seeks to have the land of which Willie Jones died seized (654) sold to pay his debts.

The defense is, that some time in 1862 Walter Jones and his mother, Priscilla, who was entitled to dower, agreed to sell one of the pieces of land to Thomas L. Lea, who then paid him its full value, and as the defendants allege *bona fide* and without notice that any debts of Willie Jones were unpaid. In January, 1864, Walter and Priscilla executed a deed of conveyance to said Lea. Some of the defendants are the heirs of Lea, and are in possession of that land.

The other defendant Patterson in like manner, in 1862, agreed to purchase from Walter and Priscilla the lot in Milton, and paid to Walter its full value. He alleges that the agreement was made *bona fide* and without notice of any unpaid debts of Willie Jones. In October, 1863, Walter and Priscilla executed to him a conveyance for the lot.

1. The question is, are these conveyances valid against the creditors of Willie Jones?

The Revised Code, chap. 46, sec. 61, says: "All sales, conveyances or alienations of any lands of a deceased debtor, made by any devisee or heir at law, within two years after probate of his will and qualification of the executor, or letters of administration on his estate, shall be void as to the creditors, executors and administrators of such deceased debtor."

It is urged for the plaintiffs that the agreement for a sale, and the payment of the price in 1862, was equivalent to an executed conveyance, and was therefore fraudulent and void as against him. We concede that. But we think the conveyances executed after the expiration of the two years are not vitiated by the prior invalid agreements. The statute imposed a restriction on the heir. He might sell within the time, but the purchaser would be defeated if creditors appeared. The law requires estates to be settled up in two years, and creditors who keep back their claim (655) beyond that time are in laches. Purchasers are entitled to infer that all debts have been paid, and there is no longer any restriction on the power of the heir to sell. Putting the agreements of 1862 aside as nonexistent as to creditors, the subsequent sales were valid, unless the plaintiff can maintain his other grounds of exception.

2. It is further urged that the act cited (Rev. Code, chap. 46) was a statute of limitations which was suspended by the Act of 1861, chap. 4, sec. 18, ratified 11 September. That section is in these words: "That the operation of the *statute of limitations* be and the same is hereby suspended so long as this act remains in force."

Now what is meant by "*the* statute of limitations?" There is but one chapter in the Revised Code entitled "limitations," chapter 65. It is confined to prescribing within what times actions shall be brought. It does not contain the enactment making sales by heirs within two years void as to the creditors of their ancestor. Rev. Code, chap. 46. All the sections of the Act of 1861, preceding section 18, relate to the bringing of actions. For these reasons we are of opinion that the Act of 1861 does not apply in the case before us, but is confined to such statutes as limit the time for bringing actions.

3. This brings us to consider the effect of the act ratified February, 1863 (Acts 1863, ch. 34). The words, so far as they are material, are as follows: "That in the computations of time for the purpose of applying *any* statute, limiting any action or suit, *or any right or rights*, or for the purpose of raising a presumption, etc., the time elapsed since the 20th day of May, which was in the year 1861, or which may elapse until the end of the present war, shall be excluded from such computation."

In *Hinton v. Hinton,* 61 N. C., 410, this act was held to cover the act (Rev. Code, chap. 118, sec. 1) by which widows were limited to six months after probate of the husband's will within which to dissent therefrom, and the plaintiff was allowed to have the benefit of a dissent made after (656) that time.

In *Neely v. Craige,* 61 N. C., 187, it was held that the Act of 1863 did not prevent a judgment from becoming dormant upon a failure to sue out execution within a year and a day.

In *Morris v. Avery, Id.,* 238, it was held that the act prolonged the time for reviving an action.

All of these cases profess to go on the ground that the object of the act was to preserve existing rights, and not to give new ones.

The distinction between the case of a widow and that of an heir is this. Chapter 118, Revised Code, says she shall not dissent after six months; that is, in effect, that she may dissent within that time. In effect it confers or secures *a right,* and the Act of 1863 preserved and continued that right. Chapter 46, Revised Code, says the heir shall not sell within two years. To give the Act of 1863 the construction contended for by the plaintiff would preserve and continue *advisability.* We think this is a distinction of substance and in principle, and not in terms only, and that the act was not intended to reach the case of an heir.

No injury is done to the creditors of the deceased, nor are they deprived by this construction of any right. There was no act staying them in suing the administrator, and if from dilatory legislation, or any cause other than their own laches, they had been unable to get a judgment against the administrator within two years, there can be no doubt that a Court of equity in some way (it is needless to consider how) would have preserved their rights against the land. But they made no effort until the rights of the defendants had vested.

It is perhaps proper to say that nothing in this opinion is intended to touch upon the liability of the sureties to the administration bond. Neither they, nor their rights, are before us.

Judgment reversed and case remanded to be proceeded in, etc.

PER CURIAM. Judgment reversed.

Cited: Renan v. Banks, 83 N. C., 485; *Orrender v. Call,* 101 N. C., 403.

(657)

BOARD OF COMMISSIONERS OF HENDERSON COUNTY v. BOARD OF COMMISSIONERS OF RUTHERFORD COUNTY.

Actions against a board of county commissioners must be brought to the Superior Court of the county wherein those commissioners reside.

(*Steele v. Comrs., ante,* 137, cited and approved).

CIVIL ACTION, an application for a *mandamus,* heard 8 September, 1873, before *Henry, Judge,* at chambers in HENDERSON County.

The plaintiff, alleging that the Commissioners of Rutherford County owe the Commissioners of Henderson $2,371.66, apply for a *mandamus* to compel its payments.

Defendants demur for want of jurisdiction. His Honor sustaining the demurrer, dismissed the complaint, whereupon plaintiffs appealed.

J. H. Merrimon, for the appellant.

Carson and *J. C. L. Harris, contra.*

READE, J. The question in this case is the same as in *Steele v. Comrs., ante,* 137, at this term, and the decision is the same, and for the same reason. The Board of Commissioners of a county must be sued in the county of which they are Commissioners.

There is no error.

PER CURIAM. Judgment affirmed.

STATE ex. rel. JAMES T. HARRELL v. JACKSON B. HARE and others.

1. In a suit on a guardian bond, evidence that the court-house of the county in which the bond was taken was burned, with many official papers, in 1862, and that search had been made among the papers of a deceased person who was Clerk at the time of the burning, and who was in the habit of keeping some of the official papers at his residence, and that no bond given by the guardian of the plaintiff had been found, was held sufficient to authorize the introduction of secondary evidence of the execution and contents of the bond declared on.

2. A certified copy of the extracts from the records of the County Court that at August Term, 1850, the guardian of the plaintiff and other minors renewed his bond by entering into another bond in the sum of $3,000 with the present defendant and another as his sureties, is competent evidence to prove the existence and due execution of the bond declared upon; and a certified copy of the guardian's return is also competent as tending to establish the amount due at the date of the return.

(*Kello v. Maget*, 18 N. C., 414, cited and approved).

CIVIL ACTION on a guardian bond, tried Spring Term, 1873, of HERTFORD Superior Court, before *Albertson, Judge.*

The plaintiff declared on a guardian bond for the sum of $3,000, executed by one James Clark as guardian of plaintiff in 1850, with J. B. Hare and W. M. Montgomery as sureties.

The action was brought against W. S. Stephenson as administrator of James Clark, deceased, John W. Harrell, administrator of W. H. Montgomery, and J. B. Hare.

When the case was called the plaintiff entered a *nol. pros.* as to Stephenson and Harrell, and announced himself as ready as to Hare.

Defendant moved to dismiss the action, because the administrator of Clark, a necessary party to the action, had been *nol. prossed,* and no guardian account of said Clark had been ordered or reported.

His Honor refused the motion and ruled the defendant into trial, whereupon defendant excepted.

The plaintiff offered a witness who stated that he is Clerk of the Superior Court; that in 1862, the court-house in Hertford County was burned and that many of the records of said county were destroyed. That L. M. Cowper, (659) now deceased, was at the time the court-house was burned, Clerk of the Court of Pleas and Quarter Sessions of said county; and that many of the records of the County Court, together with many of the papers of his office, said Cowper was in the habit of keeping at his residence in Murfreesboro; that he had searched diligently through the papers of his office and had not been able to find the bond.

The plaintiff then offered in evidence the following record of the Court of Pleas and Quarter Sessions of said county:

"At a Court of Pleas and Quarter Sessions, begun and held for Hertford County, at the court-house in Winton, on the fourth Monday in August, A. D. 1850, the following Justices present: W. B. Wise, J. G. Wilson, D. Valentine and W. W. Mitchell, Esqrs.,

"James Clark, guardian for Mason Harrell, Sarah Elizabeth Harrell and James Thomas Harrell, orphans of John T. Harrell, deceased, appeared in open Court and renewed his bond as guardian by entering into bond for the sum of $3,000, with W. M. Montgomery and J. B. Hare, sureties."

And the following record of a return by said guardian, Clark, was offered in evidence:

"Dr. James Thomas Harrell,

To James Clark, Guardian.

1857. May 26.	To amount paid Clerk		$1.00
	To commission on same		11
			$1.11
By amount due on last return		$373.91	
By interest 12 months		20.27	394.18
Balance due ward			$393.07

The defendant objected to the introduction of the foregoing evidence, alleging that it was sufficient to establish the bond the plaintiff declared upon. (660) The Court overruled the objection, and charged the jury in accordance with the foregoing facts, stating that the records offered were evidence tending to show the execution of the bond by the defendant. Defendant excepted.

W. W. Peebles and *Smith & Strong,* for appellants.
Barnes and *J. W. Faison, contra.*

RODMAN, J. The only point that is or that could fairly be insisted on in this Court by the defendant is as to the admissibility in evidence of the certified copies of extracts from the records of Hertford County Court, as tending to establish that a guardian bond had been given. There was evidence which satisfied the Judge that the court-house of Hertford County, with many of the papers in it, had been burned or otherwise destroyed in 1862; that search had been made among the papers of a deceased person who was Clerk at the time of the burning, and who was in the habit of keeping some of his official papers at his residence, and that no bond given by Clark as guardian of Harrell had been found. This the Judge properly held to be sufficient to authorize the introduction of secondary evidence and contents of the guardian bond declared on. The plaintiff then introduced a certified copy of an extract from the records of the County Court of Hertford to the effect that at August Term, 1850, James Clark, guardian of plaintiff and others, orphans of John F. Harrell, removed his bond as guardian, by entering into bond in the sum of $3,000, with W. M. Montgomery and J. B. Hare (the defendant) sureties.

A guardian bond is not strictly a record of the Court, although the fact that it was made and accepted may be. An action may therefore be brought on the bond after its loss or destruction without any previous application to the Court to restore it as a record, and in such case the proof of the bond would be such as upon general principles of (661) evidence would be competent to prove its execution, and would not essentially differ in principle from what would be proper in an action upon a non-official bond, lost or destroyed. *Kello v. Maget,* 18 N. C., 414, establishes that when a bond, purporting to be a guardian bond, is proved to have been at one time among the records of a County Court, and to have been since lost, there is a presumption that it was in the usual form of a guardian bond, and that upon proof of the identity of the person sought to be charged with the person whose name appears to have been signed to the bond, execution will be presumed without proof of the handwriting either of the parties or of the subscribing witness. The question presented in this case as to whether the entry on the record was competent evidence that the bond had been executed, did not occur in that case, and it must be decided on general principles. But *Kello v. Maget* is authority that if the jury shall be satisfied that a guardian bond, purporting to be made by Clark and the defendant as his surety, once existed among the records of the Court, they may and ought to presume its due execution by said parties, although no direct proof of that fact be obtainable.

It is not necessary to consider whether the copy of the entry of record which states that Clark did renew his bond as guardian, with Montgomery and the defendant as his sureties, was conclusive. The Judge only held it competent to prove the former existence and due execution of the bond. For this purpose we think it was clearly competent. The destruction of the bond, if it ever existed, having been proved, there was no means of proving its former existence other than by the proof of circumstances which probably would not have occurred unless it had been made, and from which the fact that it was made, might reasonably and probably be inferred. The record, given in evidence, was, at least, a circumstance of that character. It tended to prove that a guardian bond, in the lawful and usual form, had been executed and accepted by the Court; and it was the best evidence of that fact (662) which the nature of the case admitted of. We think it was competent evidence. The same principle applies to the certified copy of the guardian's return, introduced for the purpose of showing the amount owing by the guardian. The guardian's signature was not proved because the original return was lost. But it is a reasonable inference from the record that the original return was acknowledged by the guardian before the Clerk.

There is no error.

PER CURIAM. Judgment affirmed.

Cited: Nelson v. Whitfield, 82 N. C., 53; *Hare v. Hollomon,* 94 N. C., 19.

JOHN W. HOUSTON v. JOHN H. DALTON, executor of PLACEBO HOUSTON, and others.

1. In an action of the nature of a bill in equity to surcharge and falsify an account taken under a decree in a former suit, if the allegations of the complaint upon which the plaintiff bases his equity to have such account and settlement reopened are denied in the answer, so that material issues of fact or law are raised by the pleadings, such issues of fact must be tried before a motion of the plaintiff to reopen the account can be entertained.
2. When the allegations of a complaint present a case of equitable jurisdiction, as in an action to surcharge and falsify an account, such action is properly instituted in the Superior Court.

(*Murphy v. McCubbins*, 65 N. C., 246, cited and approved).

CIVIL ACION, in the nature of a bill in equity to surcharge and falsify an account, heard upon a motion to dismiss the same, by *Albertson, Judge,* Special (August) Term, 1873, of ROWAN Superior Court, to which it had been by consent removed from the Superior Court of IREDELL.

At Fall Term, 1861, of the Superior Court of Law of Iredell the defendant, John H. Dalton, as executor of Placebo Houston, and in the names of all others interested under the will of the said testator, filed an *ex parte* petition for a settlement of his testator's estate. It was referred to John A. Roseboro to take and state the account of the executor's administration of the estate, which was done and a report made, the same being confirmed by the Court. (663)

The plaintiff in this action seeks to set aside that decree and have the account retaken, etc., alleging errors in taking the first account; that the parties interested were not present nor represented; that the rights of the minors were not protected, and many other irregularities which are alleged as vitiating the *ex parte* proceeding.

The answers of the executor, Dalton, and others, deny the material allegations in the complaint of the plaintiff, as well as the plaintiff's right to the relief demanded.

Upon the trial below the plaintiff moved, upon the complaint, answers and transcript in the original *ex parte* petition of the defendant Dalton, to set aside the decree confirming the report of Roseboro in that proceeding. This his Honor refused to do, upon the ground that no sufficient cause was shown to warrant setting the decree aside at this time.

The defendants then moved to dismiss the action, which motion the Court allowed and the action was dismissed. From which judgment the plaintiff appealed.

Armfield and *McCorkle & Bailey,* for appellant.
Brown, Batchelor, Edwards and *Batchelor, contra.*

BYNUM, J. Upon the coming in of the answer the plaintiff moved to set aside the decree made in another suit confirming the report of the settlement of the estate of Placebo Houston, which it was the purpose of this action to surcharge and falsify. His Honor refused the motion. The defendant then moved to dismiss the action for want of jurisdiction, which motion was allowed and the action dismissed. The plaintiff appealed from both rulings.

1. The first exception is untenable, because the answer denies every material allegation of the complaint upon (664) which the plaintiff bases his equity to have the account and settlement of the estate reopened.

When material issues are thus raised by the pleadings, both of fact and law, the issues of fact must be tried in one of the modes prescribed in C. C. P., before this motion of plaintiff can be entertained.

2. But his Honor dismissed the action for want of jurisdiction. In this there was error.

The allegations of the complaint present a case of equitable jurisdiction only, according to our old judicial system, and when such is the case the action is properly instituted in the Superior Court. So a bill to surcharge and falsify an account, which is the nature of the action now before us, was always brought in the Court of Equity. Adams Eq., 222; *Murphy v. McCubbins,* 65 N. C., 246.

Holding, therefore, that the action is instituted in the proper Court, it is not necessary to examine the effect of the Acts of 1870-'71, chap. 108, and of 1872-'73, chap. 175, in curing all irregularities of jurisdiction. This Court, however, has decided that they are effectual for such purpose.

The judgment will be reversed and the cause remanded, to the end that the parties may proceed as they are advised. We express no opinion upon the merits of the case.

PER CURIAM. Judgment reversed.

(665)

C. H. WILLIAMS and others v. ALEXANDER and GREEN WILLIAMS, administrators, etc.

1. A rehearing is not a matter of right, but rests in the sound discretion of the Court, where the parties to a final judgment fail to appeal by their own default.

2. In a petition to rehear, it should appear either that there is error of law apparent on the record or that testimony has been newly discovered which would materially vary the case. That no pleadings have been filed in a cause before the Probate Court, and that evidence of the witnesses was not taken by question and answer, and signed, are no such grounds of error of law as will entitle a party to have the cause reheard after final judgment, especially when it appears that such party had every opportunity for a full defense and of an appeal.

CIVIL ACTION, originally a special proceeding against the defendants as administrators, for an account, etc., heard by *Tourgee, Judge,* on a petition to rehear, at chambers in PERSON County, 10 June, 1873.

Final judgment was given by the Judge of Probate after hearing the merits, from which defendants did not appeal, but in a short time filed his petition to rehear. The Judge of Probate refused the prayer of the petition and the defendants, appealed to the Judge of the District, who affirmed the judgment and dismissed the petition. From this judgment dismissing the petition the defendants appealed.

The grounds of the defendants' application to rehear, and the facts pertinent to the point decided, are stated in the opinion of the Court.

W. A. & J. W. Graham, for appellants.
Jones & Jones, contra.

BYNUM, J. This was a special proceeding in the Court of Probate for an account of the estate in the hands of the defendants as administrators of Haywood Williams, deceased, and for the payment of the distributive share of the plaintiff one of the next of kin. The account was (666) taken, exceptions filed thereto by plaintiff and defendants, which were heard by the Court and some disallowed, and a final judgment was given against the defendants on 17 September, 1872. On 5th November of the same year, the defendants filed a petition to rehear the case and let in more testimony. The plaintiff answered this petition, and after hearing the parties the Court disallowed the motion to rehear and the defendants appealed to the Judge of the District, who, after examining the record and evidence, dismissed the appeal, and from his judgment the case came up to this Court by appeal on the part of the defendants.

Conceding the power of the Court of Probate to grant rehearing under C. C. P., sec. 133, for what causes will this power be exercised? A rehearing is not a matter of right, but rests in the sound discretion of the Court when the parties to a final judgment fail to appeal by their own default. Before the Court will exercise the discretion it must appear not only that injustice has been done, but that it occurred without the laches of the petitioner. Ordinarily there are but two grounds upon which a petition to rehear will be entertained: 1. For error of law apparent on the record. 2. For newly discovered testimony which would materially vary the case. Adams Eq., 397, note 2; *Wilcox v. Wilkinson,* 5 N. C., 11; *Hart v. Smith,* 3 Rich., 465; 3 Story, 299.

Two questions of law are raised in the exceptions:

1. That no pleadings in the cause have been filed.
2. That the evidence of witnesses was not taken by question and answer and signed by them.

As to the first point, it does appear by the record that a summons was issued and served upon the defendants and a complaint regularly filed. If the defendants failed to answer it was their own default, for which they have no right to complain on a petition to rehear. As to the second error assigned, we know of no inexorable rule that requires the evidence in accounts taken to be reduced to writing in question and answer. The defendants do not allege any prejudice sustained thereby, and the objection certainly (667) comes too late upon the motion to rehear.

There are other exceptions, but as they are confined to the weight of the evidence and allegations of what the defendants could prove on a rehearing, matters addressed wholly to the discretion of the Court, it is unnecessary to notice them particularly.

The record shows that the account was taken with unusual skill and accuracy, and that the defendants had every opportunity to make a full defense and to appeal from the final judgment, and thus obtain a review of the facts as well as the law. No error of law appearing, we have no power to interfere with the discretion of the Court below.

PER CURIAM. Judgment affirmed and appeal dismissed.

Cited: Williams v. Williams, 71 N. C., 427; *S. C.,* 74 N. C., 2; *Grant v. Edwards,* 88 N. C., 249.

JOHN N. DAVIS, administrator, v. B. J. CURETON et al.

Where a tract of land upon which a widow had dower was sold for the purpose of making assets to pay debts by the administrator of the husband, in two separate parts, and she bid off both parts at unequal prices, and the sale was set aside as to the cheaper part: *It was held,* that she had the right to have the sale set aside as to the other part also, where it appeared that she would not have purchased the former part unless she could have got the latter with it.

This was a MOTION to set aside an order which was made by the Clerk of the Superior Court of UNION County, confirming the sale as to one of the two parts of a tract of land sold by the administrator of W. J. Cureton, and setting it aside as to the other. Both parts were bid off by the widow and upon the Clerk's refusing her motion she appealed to the Judge of the District, and at the last term of UNION Superior Court his Honor, *Judge Buxton,* reversed the order made by the Clerk and gave judgment for (668) the appellant, and the administrator appealed to the Supreme Court. The facts are sufficiently stated in the opinion of the Court.

Battle & Son, for the plaintiff.
J. H. Wilson, for the defendants.

READE, J. The facts alleged and not denied, and therefore the facts admitted, are that Mrs. Cureton bid off the

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NOTE.—In a kindred case—*Lovenier v. Pearce, ante,* 167, at this term—we have considered the powers of the Probate Judge and the right of appeal and the practice in appeal, and therefore it is unnecessary to repeat in this case.

second tract sold because she had bid off the first tract, and that the two tracts were useful to each other, and that without the first she would not have bought the second at all, and that she had reason to believe, and did believe, that at (669) the time she bought the second she would get the first with it. And when the sale of the first tract was set aside she found that she had acted under a mistake of facts which no enquiry could have guarded against.

We are of the opinion that because of this mistake she is entitled to relief in equity, which we administer in this action. One buys a match of horses *because they are a match;* he wants both or neither. If the vendor withholds one, he cannot compel the vendee to take the other. That would be admitted to be so where there is but one contract, but in our case there were two contracts, each tract bought separately. But still the second was bought with reference to the first, and they were really the same tract divided, and upon which the purchaser had dower. So that, under the circumstances, she not unreasonably supposed that she was buying and would get the whole tract.

There is no error. This will be certified to the end that the Court below may proceed according to law.

PER CURIAM. Judgment affirmed.

(670)

A. W. WILSON v. JACOB ARENTZ and others.

1. A tenant by the courtesy initiate has a right to sue alone for the possession of his wife's land and for damages for the detention of it.

2. A complaint by a husband which states that he was married to his wife in 1841, that he had by her several living children, and that she acquired the land in question by a deed executed to her in 1864, is sufficient to show his title as tenant by the courtesy initiate of the land; and the fact that the Act of 1848 (Battle's Rev., chap. 69, sec. 33) deprives him of the power to lease the land without the consent of his wife, will not prevent his recovery of the land by an action under the C. C. P. without joining his wife as a party.

(The case of *Williams v. Lanier*, 44 N. C., 30, and *Houston v. Brown*, 52 N. C., 161, cited and approved).

This was a CIVIL ACTION brought by the plaintiff alone to recover the possession of a tract of land and damages for the detention of it.

The complaint alleged, 1, that the plaintiff was a tenant by courtesy initiate of the land; 2, that the defendants were in the wrongful possession of it, and had for ten years received the rents and profits of it; 3, that the land was conveyed to his wife in fee in the year 1864, and she was in the seizin and possession of it; 4, that the plaintiff was married to his wife in 1841, and had by her several living children.

The defendants demurred to the complaint:

1. for defect of parties, in that the wife of the plaintiff was not joined with him as a plaintiff.

2. For that complaint did not set forth the facts sufficient to constitute a cause of action against the defendant, in that it did not appear from the complaint that the plaintiff had title to the land in controversy, or to the possession thereof, but on the contrary it did sufficiently appear therefrom that the plaintiff had no title to the land or right to the possession thereof.

The cause coming on to be heard at the last Superior Court of CATAWBA, before *Mitchell, Judge,* the demurrer was sustained, and the plaintiff appealed.

The record of the Superior Court did not show that (671) any judgment had been rendered.

Schenck (with whom was *McCorkle & Bailey*), for the plaintiff.

M. L. McCorkle, for the defendants.

(672) Rodman, J. The defendant assigns for cause of demurrer:

1. That the wife of plaintiff is not joined with him as a co-plaintiff. The answer to this is found in the opinion of the Court in *Williams v. Lanier*, 44 N. C., 30, where it is said: "For these reasons it has been settled for upwards of a century that the latter (the reversion or remainderman) may bring case in the nature of waste for the injury to the inheritance; and that the former (the particular tenant) trespass *quare clausum fregit* for the injury done to him."

In that case the particular tenant was a tenant by the courtesy initiate, and he was held barred by the statute of limitations. For an injury done to the inheritance his wife must have joined in the suit; for a trespass to the possession he could sue alone.

As the plaintiff has a right to sue alone there is no necessity to consider the effect of C. C. P., sec. 62, in such a case.

2. That the complaint does not show that the plaintiff was entitled to the possession of the land. We pass by the exception that the complaint does not positively show that the children were born after the marriage, because it is a (673) mere matter of form, which might have been amended, and was not assigned as a cause of demurrer in the Court below.

The complaint appears to state everything necessary at common law to make the plaintiff a tenant by the courtesy initiate. 1. Marriage in 1864; 2, the birth of living children; 3, the seizin of the wife under the deed from John Rabb to her in 1864.

It is suggested that the Act of 1848, Revised Code, chap. 56, sec. 1, deprives the husband of his courtesy. But the contrary has been decided. *Houston v. Brown,* 52 N. C., 161. As the plaintiff in this case was married in 1842 he comes within the meaning of that act.

Again, it is said that as by the act of 1848 the plaintiff can not lease the land, he cannot recover the possession, at least unless his wife is a co-plaintiff. Probably the disability to lease might have been a difficulty in the old action of ejectment, though probably the Courts would have moulded the fiction of a lease in such cases to meet the demands of justice. But if the plaintiff is entitled to the possession, the inability to lease is no bar to his recovering it; and if he is tenant by the courtesy initiate, as it has been held that he is, he must necessarily be entitled to the possession, there being no other immediate estate.

The record in this case fails to set forth that any judgment was rendered below.

PER CURIAM. The case is remanded to be proceeded in, etc., but by reason of the defect mentioned, neither party will recover costs in this Court.

BYNUM, J., did not sit, having been of counsel.

Cited: Jones v. Cohen, 82 N. C., 81; *McGlennery v. Miller,* 90 N. C., 220; *Osborne v. Mull,* 91 N. C., 206; *State v. Mills, Id.,* 593; *Morris v. Morris,* 94 N. C., 618; *McCaskill v. McCormac,* 99 N. C., 551; *Thompson v. Wiggins,* 109 N. C., 509; *Walker v. Long, Id.,* 511; *Taylor v. Taylor,* 112 N. C., 138.

(674)

WILLIAM LONG and others v. W. FISH and wife and others.

1. The joinder of a motion to amend by restoring a part of the record in an old equity suit for partition and sale, with a prayer for relief by the correction and re-execution of a deed, is a good ground for demurrer, which is, however, waived if the demurrer is not filed in apt time.

2. The amendment may be made by a motion, after notice, in the original cause to the Judge of the Superior Court, who exercises the jurisdiction heretofore exercised by the Judge of the Courts of Equity.

3. Where the allegations in a complaint (praying the correction and re-execution of a deed) that the fee-simple in the land was sold and brought a good price, and that by mistake the word "heirs" was omitted and the seal of the Clerk and Master was not affixed, are not controverted in the answer, or where the answer as to such allegations is so obscure and meaningless as to have no legal effect and to amount only to a "sham plea," the presiding Judge was right in refusing to submit the issues of fact to the jury and in adjudging that the correction should be made.

CIVIL ACTION to restore a lost record and correct a deed, heard before *Mitchell, Judge,* Spring Term, 1873, of the Superior Court of IREDELL.

The case as settled by the presiding Judge and sent up to this Court is substantially as follows:

This was a motion to restore a lost record founded on an action brought to Spring Term, 1871, of Iredell Superior Court, praying for a restoration of said record, which was a record of the former Court of Equity of said county, and also for the correction of a paper writing purporting to be a deed made by L. Q. Sharpe, former Clerk and Master of said Court. After the restoration of said record as prayed in the plaintiff's complaint, the action was heard and judgment rendered for the correction of said paper writing.

The complaint in said action alleged that there had been a bill filed in the Court of Equity of Iredell County at Fall Term, 1841, in which George F. Davidson, as executor of John Mayhew, and also as trustee of Presley Mayhew, (675) Mahala Holdsclaw, wife of James Holdsclaw, Matilda Hobbs, wife of H. Hobbs, and also the children of said Presley Mayhew, and also as trustee of the children of Matilda Hobbs and others, interested in the lands known as the John McCowan tract, were parties plaintiffs against George W. Mayhew and others, also interested in said lands, which bill asked for a construction of the will of John Mayhew and for the sale of certain real estate and personal property for partition and distribution among the parties entitled thereto. And it further alleged that a part of the record in said case in equity, to-wit, the original bill filed in the case, had been destroyed by fire in December, 1854; that the lands known as the McCowan tract had been sold by an order made in the cause, and that one William Long, Sr., was the purchaser thereof, buying the fee-simple for a full and fair price, and that the sale was confirmed by the said Court of Equity. It was further alleged, that William Long, Sr., had paid the purchase-money to the Clerk and Master, who had been ordered by the Court to make a deed in fee for said land to said Long; that one L. Q. Sharpe was the then Clerk and Master, had attempted to make the deed as ordered, and had delivered to said Long a paper writing purporting to be a deed, in which the words of inheritance are omitted, and no seal was affixed thereto; that the equitable title of William Long, Sr., had come by proper conveyances to William Long, Jr., and wife, and to John Long, and through them to J. J. Mott, all of whom are plaintiffs in the said suit.

The complaint demanded that the lost record should be restored, and the paper purporting to be a deed should be corrected, and for other relief.

The defendants insisted that the application to restore the record, should be made before the Clerk of the Superior Court of Iredell County; and further, that the issues of fact raised by the complaint and answer should be submitted to a jury. This his Honor refused and proceeded to hear the evidence in the case. The defendant offered no evidence; and his Honor finding the facts to be as hereinbefore set (676) out ordered the record to be restored and the deed corrected by adding proper words of inheritance and affixing thereto a seal.

Defendants excepted to this order of the Court on the grounds that there was no sufficient evidence to justify the finding such facts; and that there was no sufficient averment of the contents of the original petition set forth in the plaintiff's complaint, and insisted that the plaintiffs were barred of their relief by the statute of limitation. During the examination the defendants objected to the testimony of George F. Davidson, who was examined as a witness for the plaintiffs, because after stating that he caused the bill before mentioned to be filed by his counsel, Bartlett Shipp and Julius Alexander, Esqrs., and that according to his recollection all the heirs and devisees of John Mayhew who were living in the State were made plaintiffs in said bill, and the non-residents were made parties defendant therein and were brought in by advertising. He further stated, on cross-examination, that he could not now recollect whether or not he ever read said bill, or heard it read, or the name of any particular person, either plaintiff or defendant therein contained.

His Honor overruled the objections brought forward by defendants and gave judgment as before stated, from which judgment the defendants appealed.

McDowell, McCorkle & Bailey and *M. L. McCorkle,* for appellants.

Armfield, Caldwell and *Furches, contra.*

PEARSON, C. J. The joinder of a motion to amend in the old suit, *Davidson v. Mayhew,* for partition and sale, with a prayer for relief by the re-execution and correction of the deed executed by L. Q. Sharpe, C. M. E., on the ground of mistake, might have been cause of demurrer, but as no demurrer was filed the objection is waived, and the case is before us on both of the questions.

In regard to the amendment: The matter is the (677) subject of a motion in the original cause to be made, not to the Clerk, but to the Judge of the Superior Court, in term, upon notice, on the ground that he now exercises the jurisdiction heretofore exercised by the Judge in Courts of Equity under the old system. So the demand for an amendment in this action is put out of the case, and the judgment in the Court below is reversed in respect to the amendment. In regard to the re-execution and correction of the deed executed by Sharpe, upon the allegations of the plaintiffs, which are not controverted by the right of the plaintiff to have the deed re-executed and corrected so as to add the word "heirs," and a "seal" and give to it the effect of a deed in fee-simple is clear, and the judgment is affirmed.

The objection that "his Honor refused to have the issues of fact submitted to a jury," is met by the fact that in respect to the alleged mistake in the execution of the deed, and the averment that "a fee-simple estate was sold," and "that a fee-simple price was bid and paid in cash," was not controverted, nor was the fact that Mr. Sharpe, by mistake, omitted to put his seal to the paper controverted. We think his Honor committed no error in treating the second clause of the answer as obscure, unmeaning and of no legal effect. The clause is in these words: "The defendants deny the other allegations of said complaint, and say the land mentioned in the pleadings belongs to them; that there never was any valid sale thereof, as alleged, and deny that the plaintiffs are entitled to any relief in the premises." This is a beautiful specimen of precision and perspicuity in pleading, and is an instance of what the books call a "sham plea," that is, one put in for form sake, but presenting no matter upon which a material issue of fact can be joined.

It is adjudged that the Clerk of the Superior Court of Iredell County as successor of the Clerk and Master in Equity for said county re-execute the said deed by supplying the words necessary to convey an estate in fee-simple, and by adding a seal so as to make it take effect as (678) a deed in fee-simple *at the date of the original attempt* to convey a fee-simple estate. This he will do by executing a deed to Mott reciting that he is the assignee, and that the deed is made by order of the Superior Court, to take the place of the deed of L. Q. Sharpe to William Long as of its date.

Should the plaintiffs be advised that the deed thus re-executed, together with the long uninterrupted possession under this color of title, needs further assurance, they can take the necessary steps in order to have the proceedings in the old case of *Davidson v. Mayhew*, on which the title depends, made perfect by a motion in that case before the Judge of the Superior Court, who succeeds to all of the jurisdiction of the old court of equity as well as law.

The judgment will be modified according to this opinion, each party to pay half of the costs of this Court.

PER CURIAM. Judgment accordingly.

BYNUM, J., did not sit.

(679)

DAVID CLARK v. JOHN BUXTON WILLIAMS and TEMPE D., his wife, and others.

1. A surety to an administration bond who paid one-half of a debt recovered against the insolvent administrator is not subrogated to the rights of the *creditor* whose debt he paid, but to the rights of the *administrator* for whom he paid it.

2. An administrator against whom a judgment was recovered after he had turned over the property of his intestate to the distributees has the right to recover from them each their ratable part of such debt when it appears that the intestate was only surety to the debt recovered, and that at the time he delivered the property to the distributees the principal in the debt was solvent and able to pay the same and was rendered insolvent by the manumission of his slaves.

3. In such case the distributees will contribute each their ratable part and no more, the solvent ones not having to pay the parts of the insolvent.

(*Donnell v. Cooke*, 63 N. C., 227, cited and approved).

CIVIL ACTION, tried at the Special (December) Term, 1873, of the Superior Court of HALIFAX County, before *Moore, Judge.*

The counsel for the parties agree to the following as the material facts in the case:

In the summer of 1859 Samuel J. Clark died intestate and without issue, domiciled in the county of Halifax, North Carolina, possessed of a large estate, consisting of slaves and other personal property. Many of the slaves were settled in Louisiana and a large number in North Carolina.

The intestate left a widow, who is the defendant Tempe D., since intermarried with the defendant John Buxton Williams, November, 1869. The intestate was married in North Carolina in the year 1858, and both he and his wife were then possessed of many slaves.

Soon after his death, to-wit, in August, 1859, administration on his estate was granted to the defendant David C. Clark, a brother, who entered into a bond of $40,000, with Lewis Thompson, now deceased, and the plaintiff, as (680) his sureties. In September of the same year the widow of the intestate and his brothers and sisters entered into a written agreement by which the said widow was to have the slaves in North Carolina chargeable with one-half the intestate's debts, and his brothers and sisters were to have the slaves in Louisiana. In the month of April, 1862, the administrator made a statement concerning the estate and submitted it to one E. A. Thorne, a brother and the agent of the defendant Tempe D., who was then a widow, and he delivered to said agent for the benefit of Tempe D. the sum of $2,859.07. The statement submitted was signed by the agent and returned to the administrator.

The administrator never made any return of an account of his administration until after the commencement of this suit. The widow also received from the administrator all the other perishable property in this State, which consisted of a carriage and a match of horses, also several mules and some household furniture, of value more than sufficient to pay plaintiff's demands. This property was never taken away from the home of the widow but was allowed to remain with her.

At the time of the death of the intestate he was surety with the defendant David C. Clark on the bond of his brother the defendant Gavin H. Clark for the sum of $2,000, dated 5 April, 1859, payable one day after date to one Charles F. Urquhart, as guardian of two infant wards. On said bond a credit of $566.78 was entered 3 August, 1863. Of this debt the widow, the said Tempe D., was ignorant and knew nothing about it until about the time of instituting this suit. She was ignorant also of what debts were included in the papers signed by said E. A. Thorne, agent as aforesaid. It is admitted that the debt to Urquhart was not one of those included in that paper; and also that it was not paid by the administrator for the reason alleged by him, to-wit, the principal was a man of large estate and was perfectly solvent until the close of the civil war, when he became, and hath so continued to be, insolvent. (681)

The defendant David C. Clark became insolvent about the same time, and is so still.

Charles F. Urquhart, the guardian as above stated, who was a resident of the State of Virginia, brought suit in the United States Circuit Court for the District of North Carolina against the said David C. Clark, as administrator as aforesaid, and at June Term, 1869, obtained judgment,

$2,000; damages (interest to 7 June, 1869), $803.30; costs, $38.88.

Afterwards, to-wit, the said Charles F. Urquhart having died, his executors, William F. Urquhart and Joseph F. Urquhart, brought suit in said Circuit Court against the plaintiff in this suit, and the defendants, Margaret A. Thompson, executrix, and Thomas W. and William C. Thompson, executors of said Lewis Thompson, upon the administration bond of said David C. Clark; and at June Term, 1870, of said Court, the said executors of said Charles F. Urquhart, obtained a judgment for the penalty of said administration bond, to be satisfied on payment of $2,838.44, the damages assessed and former costs of $47.01, and costs of suit then determined, to-wit, $48.20.

On 5 November, 1870, the plaintiff, David Clark, paid one-half of said judgment, interest and costs, amounting to $1,245.45, and the executors of said Lewis Thompson, at the same time, or a short time before, paid a like sum to the plaintiff in said judgment, being the other half thereof.

A. B. Urquhart, one of the parties to the agreement, and his wife, M. E. Urquhart, died domiciled in Virginia, and have never had any representation in this State. The defendants William M. Clark and Gavin H. Clark are insolvents. The estates of Lewis Thompson, John Buxton Williams, Charles J. P. Alston, who intermarried with Mary J., a sister of the intestate, and Charles Smallwood, who intermarried with Harriet J., another sister of the intestate, are all solvent.

The brothers and sisters of the intestate Samuel F. Clark each received personal property of his estate, consisting of slaves, mules, etc., of the value of several (682) thousand dollars, and also real estate of great value.

The administrator of Samuel F. Clark took no refunding bond from any of the parties. The plaintiff demanded of the solvent defendants payment of the sum paid by him on account of the judgment aforesaid.

Upon the foregoing state of facts his Honor, the presiding Judge below, gave the following judgment:

That the defendants Margaret Thompson, executrix, and Thomas W. Thompson and William C. Thompson, executors of Lewis Thompson, deceased, having paid for the estate of their testator, as a co-surety with the plaintiff, an equal part of the money recovered by Joseph W. Urquhart and William F. Urquhart, executors of Charles F. Urquhart, and in excess of their testator's ratable part of the sum required to pay the plaintiff's claim, are not further liable in respect thereto.

That the defendants John Buxton Williams and wife Tempe D., and the defendants Charles P. Alston and Charles Smallwood (the defendants William M. Clark, David C. Clark and Gavin H. Clark being insolvent) are liable to the full amount of the plaintiff's demand, to be contributed as among themselves, one moiety by said John Buxton Williams and wife, and the other moiety by the defendants Charles P. Alston and Charles Smallwood.

And the Court doth thereupon adjudge that the plaintiff recover of the said John Buxton Williams and wife, Tempe D., Charles P. Alston and Charles Smallwood, the sum of twelve hundred and forty-five dollars and forty-five cents, this money so paid by him, and interest thereon from 6 November, 1870, till paid, and his costs.

From which judgment the defendants appealed.

Conigland and *Moore & Gatling,* for appellants.
Smith & Strong and *Walter Clark, contra.*

READE, J. The plaintiff, who was one of two sureties to the administration bond, and paid one- (683) half of a debt recovered against the insolvent administrator, is not subrogated to the rights of the *creditor,* whose debt he paid, but to the rights of the *administrator,* for whom he paid it. It follows, that if the administrator has no rights, the plaintiff, his surety, has none. It becomes important, therefore, to determine the rights of the administrator.

The administrator delivered over the property of the estate to the distributees, leaving a debt against the estate unpaid, and which was subsequently recovered against him. Can he recover back of the distributees? It is settled that he cannot. *Donnell v. Cooke,* 63 N. C., 220. To this general rule there is the exception that if he can show *special circumstances* to rebut the idea of negligence he may recover back. *Ibid.* The special circumstance relied on in this case is that the intestate was not principal in the debt against the estate, but was only the surety; and the principal was, beyond all question solvent, and able to pay, and was rendered insolvent by the unforeseen accident of the emancipation of his slaves. So that it would have been over-scrupulousness, if not down-right wrong, for the administrator to hold the estate in his hands to pay a surety debt which there seemed to be not the slightest probability that he would have to pay.

The administrator, under these circumstances, being entitled to recover back of the distributees, and the plaintiff surety being substituted in his place, the question is, in what proportion must the distributees contribute? If they had executed the usual refunding bonds with sureties they would have been conditioned that each distributee should contribute his "ratable part." It was the privilege of the administrator to require such bonds. As he did not do so, their liability to *him* is each for his ratable part only. And the solvent ones are not liable to pay the parts of the insolvent.

The judgment below must be modified so as to give the plaintiff judgment here against Williams for one-(684) half of his claim, and judgment against each of the other defendants for one-eighth of the other half.

The case has been obscured by considering the plaintiff as subrogated to the rights of the *creditor*. He is not subrogated to the rights of the creditor, but to the rights of the *administrator*. Suppose, then, that the administrator had paid off the debt, his right would have been to call upon Williams for one-half, and upon each of the eight next of kin for one-eighth of the other half. What the administrator could have done, his surety, the plaintiff, can do, and no more.

It will be noticed that this view puts in Mrs. Thompson for one-eighth also, although she has already for her husband as co-surety with the plaintiff, paid as much as the plaintiff has. So that it now becomes proper for us to determine the rights and liabilities of the defendants, not to the plaintiff, but as among themselves, which we are authorized to do under Code of Civil Procedure, sec. 248.

Just as the plaintiff, one of the sureties of the administrator, is entitled to take the place of the administrator to recover of the distributees what he has been obliged to pay, so Mrs. Thompson and the other representatives of Lewis

Thompson, deceased, the other surety of the administrator, and who was obliged to pay one-half the debt, is entitled to take the place of the administrator and recover from the distributees what Mr. Thompson paid. Mr. Thompson's representatives are therefore entitled to judgment against Williams for one-half of what Mr. Thompson or his estate paid, and against each of the eight distributees (other than himself) for one-eighth of the other half. So that it will work out that Williams will pay one-half the debt, and each of the eight distributees pay one-eighth of the other half of the debt. And the plaintiff and Thompson, the sureties of the administrator, lose the insolvent shares.

There will be judgment here for the plaintiff according to this opinion, and for the representatives of Lewis Thompson, deceased, according to this opinion. And the plaintiff and the representatives of Thompson will recover (685) their costs.

PER CURIAM. Judgment modified.

Cited: Sloan v. McDowell, 71 N. C., 359; *McNeill v. Hodges,* 105 N. C., 55; *Liles v. Rogers,* 113 N. C., 201; *Davis v. Mfg. Co.,* 114 N. C., 334; *Denton v. Tyson,* 118 N. C., 544.

T. R. TATE v. SAMUEL P. SMITH.

A tender of Confederate money, to be valid to stop interest, should be accompanied with an offer to pay the scaled value of the note or claim sued upon; otherwise interest will run from the demand of payment or from the time the process in the action is served.

(*Jeter v. Littlejohn,* 7 N. C., 186; *Bank v. Davidson, ante,* 118, cited and approved).

CIVIL ACTION to recover the amount of a note given in 1862, tried before *Logan, Judge,* at Fall Term, 1873, of MECKLENBURG Superior Court.

Upon the trial below, the case was submitted to the jury upon an alleged tender. The jury found that there was a tender of Confederate money by the defendant Smith to plaintiff's testator when the note fell due. Thereupon the plaintiff moved for a judgment for the scaled value of the note, with interest from the commencement of the action. This his Honor refused, and gave judgment for the scaled value of the note without interest.

Rule for a new trial granted and discharged. Judgment and appeal by plaintiff.

Wilson & Son, for appellants.
McCorkle & Bailey and *Vance & Dowd, contra.*

RODMAN, J. This case differs in no material respect from *Bank v. Davidson, ante,* 118.

Mr. Bailey, for defendant, referred us to *Jeter v.* (687) *Littlejohn,* 13 Mass., 186. We think that case sustains the decision in the case of the Bank of Charlotte.

He also contended that by the English authorities, after interest had once ceased by a tender, it could not be made to run again by bringing an action, but only by a personal demand before action. There is no doubt that in ordinary cases, if the plaintiff replies to a plea of tender, that he afterwards demanded the exact sum due, and payment was refused, this demand not only sets the interest to running from the demand, but defeats the plea of tender altogether, so that interest would run uninterruptedly from the maturity of the debt, or other time provided for in the instrument. Therefore we said, in *Bank v. Davidson,* that the demand started the interest again, *at least* from the time of the demand. But we have considered it inequitable to apply to the peculiar class of contracts made during the war, and payable in Confederate money, the strict rules applicable in ordinary cases to the plea of tender. If we had done so the plea could in no case be maintained, because the money was not, and could not be, as money, paid into Court. Under like circumstances, and for like reasons, the bringing into Court was held unnecessary in *Jeter v. Littlejohn,* and the Court thought that the rights of the parties should be ascertained on principles of equity. In that case the Court also thought that interest should revive upon the demand. It does not clearly appear whether there was a personal demand before suit, though probably there was. But the bringing of the action was certainly a demand, and if the defendant had paid into Court with his plea the scaled value of the Confederate money it might have been a question whether he should be taxed with the costs, and if he had tendered it to the plaintiff immediately upon service of the process a like question would have arisen as to his liability to interest after such tender. But there has been no such tender.

The ordinance of the Convention of 1866, and the subsequent acts of the Legislature, required the Courts to apply equitable principles in the construction and (688) enforcement of Confederate contracts, and though those acts do not directly bear upon the question as to the effect of a tender and subsequent demand, yet we have considered ourselves bound by the evident intent of those acts in treating those questions on like equitable principles, looking rather at the substance of what was done than at its precise time and form.

The judgment will be modified in conformity to this opinion. Neither party will recover costs in this Court.

PER CURIAM. Judgment modified.

ANDREW BAGGARLY v. WILLIAM J. CALVERT and others.

Under C. C. P., sec. 64, subsecs. 3 and 4, an action does not abate by the death of the plaintiff, unless so adjudged by the Court. That section invests the presiding Judge with plenary powers in the premises, which is not the subject of revision by this Court unless there appears an abuse of those powers.

(*Smith v. Mitchell,* 63 N. C., 620, cited and approved).

CIVIL ACTION, an original bill in equity before the adoption of The Code, heard by *Mitchell, Judge,* upon a motion to dismiss, at Fall Term, 1873, of IREDELL Superior Court.

The plaintiff filed his bill in the former Court of Equity of said county in 1866. It was regularly transferred to the Superior Court, in which at the Fall Term, 1872, the death of the plaintiff was suggested. At the succeeding Spring Term, 1873, the widow of the plaintiff, Sarah, and his heirs at law, came in and asked to be made parties plaintiff.

It also appeared that no person had taken out letters of administration on the estate of A. Baggarly.

At Fall Term, 1873, the defendant moved the (689) Court to order and adjudge that an administrator of said Baggarly was a necessary party, and that the suit had abated.

His Honor being of a contrary opinion refused the motion. The defendants then moved to dismiss the suit for want of security for costs, and for non-compliance with the rules and orders heretofore made by the Court to give security, or deposit one hundred dollars in the hands of Mr. Boyden and the amount of the proceeds of the tobacco in J. H. Dalton's hands, said to be about $100, and file a certificate of merits of action by consent of counsel, which orders and rules are of record.

The plaintiffs showed that $100 had been deposited with the Clerk, but proved no further compliance with said orders; nor was there any application for leave to prosecute the suit without security. His Honor refused this motion, and the defendants appealed.

Caldwell, Brown and *Batchelor & Edwards,* for appellants.

Armfield and *McCorkle & Bailey, contra.*

BYNUM, J. The allowance or refusal of the motions made by the defendants was a matter of discretion for his Honor, and we think he so exercised that discretion as to promote the ends of justice; under C. C. P., sec. 64, subsecs. 3 and 4, an action does not abate by the death of the plaintiff unless so adjudged by the Court. The law wisely entrusts that power to him, in order that actions may not be dismissed hastily, by surprise, by taking advantage of ignorance, poverty, or, as in this case, because no one has administered upon the estate of the plaintiff so as to become a party. The Court will, therefore, in each particular case so mould and direct the practice and procedure by giving time, requiring notice and other rulings, as will most effectually subserve the ends of justice. The section referred to *supra* is as follows: "At any time after death, marriage or other disability of the party plaintiff, the Court in which the action is pending, upon notice to such persons as it may direct, and upon application of any person aggrieved may, *in its discretion,* (690) order that the action be deemed abated, unless the same be continued by the proper parties, within a time, *to be fixed by the Court,* not less than six months, nor exceeding one year from the granting of the order." This section of the Code of Civil Procedure vests the Court with plenary powers in the premises, and this Court sees no abuse of power which it can revise. *Smith v. Mitchell,* 63 N. C., 620.

The same may be said of the refusal of his Honor to dismiss, because of the non-compliance with the rule to give security for costs, and to make affidavit of merits. These also are matters of discretion, which this Court will not review.

Judgment affirmed, and cause remanded that the administrator of A. Baggarly be made a party, and on certificate of merits being filed by counsel, and affidavit in due form of inability to give other security, the plaintiff will be allowed to prosecute the action.

As the plaintiff has not been diligent in complying with the orders of the Court below, he must pay the costs of this Court.

PER CURIAM. Judgment affirmed.

Cited: Coggins v. Flythe, 114 N. C., 277.

(691)

C. A. CARLTON, administrator de bonis non, with the will annexed, of JAMES S. BYERS, and others, v. WASHINGTON BYERS and others.

In an application to sell land to pay debts by an administrator *de bonis non,* with the will annexed, when it appears that the first executor assented to and paid the legacies of the testator's personal property, without paying the debts, and that such executor had given a bond for the faithful administration of the assets of his testator, one of the sureties on said bond being at the time of the application solvent, and that the personal property left by the testator was sufficient to pay his debts: *Held,* that the administrator *de bonis non,* etc., must first sue on the bond of the executor before he can obtain a license to sell the real estate, and that the order directing a sale at this time was erroneous.

(*Latham v. Bell,* 69 N. C., 135, cited and approved).

CIVIL ACTION, special proceeding for the sale of land to pay debts, heard and determined by *Mitchell, Judge,* Spring Term, 1873, of the Superior Court of IREDELL.

The defendants excepted to the rulings of the Judge on the trial below, and appealed from his Honor's order for the sale of the lands, as prayed in the complaint of the plaintiffs. In regard to this point, the only one noticed in this Court, all the facts necessary to an understanding thereof are set out in the opinion of *Justice Reade.*

M. L. McCorkle, for appellants.
Schenck and *McCorkle & Bailey, contra.*

READE, J. James S. Byers died in 1863, leaving personal property enough to pay all his debts, which, however, he bequeathed to divers persons; and his executor, Washington Byers, delivered over the property to the legatees without paying the debts. In 1870, the executor was removed, and the plaintiff Carlton was appointed administrator *de bonis non,* with the will annexed, and brought this action for license to sell the real estate of the testator, which (692) had been devised to the defendants. The defendants resisted the order of sale upon the grounds:

1. That it appeared from the complaint that the executor, Washington Byers, gave bond, with sureties, for the faithful

administration of the assets, and that one of the sureties was solvent; and, therefore, the plaintiff ought first to have sued upon the bond.

That position is well taken; and is supported by *Latham v. Bell,* 69 N. C., 135, and the cases there cited.

2. For a further defense, the defendants allege that their land ought not to be sold, because the personal estate was previously liable, and that the creditors colluded with the executor by bringing suits against him and fraudulently consenting to have the plea of no assets found for him; and that by said collusion, and by long delay, they have continued to deprive the defendants of the right which they had to have the personal estate applied to the debt in exoneration of their lands.

The fact is stated in the case for this Court that the executor did assent to all the legacies of personal property but the alleged fact of the collusion of the creditors is not stated, and seems not to have been passed upon. Supposing the fact to exist, and that it would avail the defendant, it would seem that the creditors ought to be parties. But it is unnecessary for us to pursue the matter farther, as the first point is decisive against the application for license to sell, which is the only question now before us. The order directing a sale is reversed and the case is remanded that the parties may proceed as they may be advised.

Whether there should be a motion to dismiss, or a motion to continue until an action can be instituted against the solvent surety to the bond of the executor, or whether the creditors must resort to their action against the defendants as devisees of the land, or be brought in as parties to this action and answer the alleged fraud and collusion, are questions which have presented themselves but which the meagre facts do not enable us satisfactorily to decide, if (693) it were necessary that we should.

Order of sale reversed and the cause remanded and this opinion certified.

PER CURIAM. Order reversed.

Cited: Lilly v. Wooley, 94 N. C., 415; *Tulburt v. Hollar,* 102 N. C., 409; *Clement v. Cozart,* 107 N. C., 700.

C. OVERMAN and others v. THOMAS GRIER, administrator, etc.

1. In a creditor's bill against an administrator, when it is found upon a reference to ascertain the debts that the fund is sufficient to pay such debts, a judgment against the administrator, on the admission of the debt, is taken as full proof, for the reason that the other creditors are not interested in the matter.
2. On the contrary, when the fund is not sufficient to pay the debts, each creditor is allowed to dispute the debt of any other, and the debt of such other creditor must be proved *de novo* before the referee; for in such case the creditors have a direct interest in the question, debt or no debt, inasmuch as its allowance will diminish the fund *pro tanto*.
3. The makers of a promissory note, being indebted to A, made it payable and delivered it to B and C, administrators, for the purpose that the amount of the note might be credited on a claim due their intestate from A: *Held*, that the acceptance of the note by B and C, although they refused to credit A with the amount, enured to his (A's) benefit, and that he had a right to hold the makers responsible for the amount.

CIVIL ACTION, creditor's bill against the estate of the defendant's intestate, tried on exceptions to the report of the Commission, by *Moore, Judge,* Special (July) Term, 1873, of MECKLENBURG Superior Court.

At Spring Term, 1869, it was referred to E. A. Osborne, the Clerk of the Court, to report the amount of indebtedness against the estate of Z. N. Grier, the defendant's intestate. After advertising for the creditors to come in and file their claims the Clerk made a report, which was excepted (694) to by the plaintiffs because he had included a debt as duly owing by the estate of Z. N. Grier, the intestate, to R. F. Davidson, which should not be a charge against said estate for the reason that the note offered in evidence by said Davidson was payable to Joseph W. Wilson and William Johnston, as executors of William Carson and never accepted by them, and that the same was never intended by the makers of the note to operate as an indebtedness on their part to said Davidson.

And further, that the debt reported as owing to C. Dewey was compromised at a sum greatly less than the amount reported by the Clerk, and that the parties interested therein have no right to claim a dividend on the nominal amount of principal and interest on said debt as reported.

It was referred back to the Clerk to report the facts in regard to the debts excepted to, who found the same and reported, as follows:

"The note of $1,780 on W. W. Elms, and Z. N. Grier as his surety, was made payable to J. W. Wilson and William Johnston, executors of William Carson, or order, and dated 30 September, 1850; the consideration for which was the interest of R. F. Davidson in the stock of goods owned by the then firm of W. W. Elms & Co., of which R. F. Davidson was then a member. That the note was drawn by Elms payable to Wilson and Johnston, executors as aforesaid, in order that it might be used by said Davidson as a credit on a note which, he, Davidson, owed to said executors, which accounts for its not having been drawn payable to Davidson himself. That Davidson commenced a suit on the note in the Superior Court against said Elms & Grier in 1860, and that a suit in equity was commenced on the same at Fall Term, 1870, the former being brought in the name of William Johnston and J. H. Wilson, executors of William Carson, to the use of R. F. Davidson, against said Elms & Grier. That upon the death of Z. N. Grier, his administrator, Thomas Grier, the defendant herein, was duly made a party to said suits, and that at the Spring Term, 1870, of the Superior Court of said county, the suits were compromised according (695) to terms filed, to-wit, that Davidson was required to pay all the costs of both of the said suits, and be allowed to prove his claim against the estate of the said Z. N. Grier, to the extent of the said note, and that he, Davidson, has paid the costs in both said suits. It was also reported as a fact in the cause, that J. H. Wilson and Wm. Johnston, executors of said William Carson, refused to accept or receive said note as a credit upon Davidson's indebtedness to the estate of their testator, and that said Davidson held said note under the impression and belief that the makers thereof were bound to him for its payment. The note was duly presented and proven before the Clerk within the time prescribed by the order of the Court for the creditors to come."

Upon the foregoing facts his Honor gave judgment permitting the said note of R. F. Davidson to be proved against the estate of the said Z. N. Grier, from which judgment the plaintiffs appealed.

Bailey & McCorkle and *R. Barringer,* for creditors.
J. H. Wilson, contra.

PEARSON, C. J. This is a "creditor's bill" under the old mode of procedure. We find upon an examination of the authorities referred to, Adams Eq., 252 (582), the rule is, where the fund is *sufficient,* upon a reference to ascertain the debts, a judgment against the executor or administrator on the admission of the debt is taken as full proof, for the reason that the other creditors are not interested in the matter. But when the fund is *not sufficient,* each creditor is allowed to dispute the debt of any person claiming to be creditor and the debt must be proved *de novo* before the referee; for in such cases the creditors have a direct interest in the question, debt or no debt, inasmuch as its allowance will diminish the fund *"pro tanto."*

In our case the fund is insufficient, and according to the rule the other creditors are at liberty to dispute the validity of the claim set up by R. F. Davidson, and are not (696) bound by the admission or the supposed estoppel of the administrator of Zanus Grier, growing out of the compromise between the administrator and R. F. Davidson, by which Davidson dismissed the two suits referred to in the pleadings, and paid the costs, and the administrator agreed in consideration thereof "to allow Davidson to prove his debt against the estate to the extent of the note."

2. We concur with his Honor in the conclusion that the facts found prove that the note was delivered to Wilson & Johnston, although they refused to allow it as a credit upon Davidson's indebtedness to their testator.

Davidson paid full value for the note by accepting it in satisfaction for his interest in the stock of goods, owned by the firm, Elms & Co., of which Davidson was a member; and the report finds "that the note was drawn by Elms, payable to Wilson & Johnston, executors, in order that it might be used by Davidson as a credit on a note which he, Davidson, owed to said executors. This accounts for its not being drawn payable to Davidson himself."

So Davidson was the beneficial owner of this note, it was not made for his accommodation, but as a matter of business, and he accepted the delivery in the name and as agent of

Wilson & Johnston, under the expectation that they would give him credit for the amount upon a debt which they held against him. It is true they refused to accept the note *as a credit*, but there is no evidence that they objected to his having acted as their agent, in accepting delivery for them, on the contrary the presumption is that they did not refuse to ratify his act, so far as to give validity to the note, and allow the legal title to stand in their names for the use of Davidson.

There is no reason why they should have refused to ratify his action in accepting delivery, although they refused to allow it as a credit. All of the circumstances show that they did not refuse to ratify his action, so far as to give legal effect to the note. For Davidson keeps (697) the note and brings an action in their names, for his use, which action pended for several years without objection on their part.

We concur with the ruling of his Honor.

PER CURIAM. Judgment affirmed.

BYNUM, J., did not sit.

Cited: Wordsworth v. Davis, 75 N. C., 162; *Long v. Bank,* 85 N. C., 357; *Dobson v. Simonton,* 86 N. C., 497.

W. M. and M. P. PERSON, executors, v. CHARLES PERRY and others.

A surety of a judgment debtor has an equity to be subrogated to the rights of his creditor when it has been agreed by several creditors of the same debtor that his land should be sold, although conveyed before their executions became liens, and the proceeds of such sale should be divided in proportion to the amounts of their judgments, the judgment of the creditor whose debt was secured being credited with his interest in the proceeds of the sale so as to diminish the amount to be paid by the surety; and if this agreement as alleged in the complaint is denied or controverted by the answer, issues must be made and submitted for the purpose of establishing said agreement before the equities of the plaintiffs can be declared.

CIVIL ACTION and application for an injunction, heard before *Watts, Judge,* Fall Term, 1873, Superior Court of FRANKLIN.

Upon the trial below the jury found all the issues submited to them in favor of the plaintiffs. Judgment and appeal by defendants.

The facts necessary to an understanding of the points decided are stated in the opinion of the Court.

Batchelor, Edwards & Batchelor, for appellants.
Busbee & Busbee, contra.

PEARSON, C. J. The complaint does not set out with clearness the grounds upon which the equity of the (698) plaintiffs is put, but the substance of it is that A. S. Perry had a judgment against David Stone and Jesse Person who was *his surety.* The other defendants also had judgments against said Stone; executions issued on these judgments and were levied on the land of Stone.

But sometime prior to the lien of these executions, Stone had conveyed the land to his two sons-in-law, and it was agreed between the execution creditors that a sale of the land should be made under their execution, and that Mr. Davis, as agent of the creditors, should become the purchaser, and have the sheriff's deed made to A. S. Perry, who was to hold it until the cloud on the title, caused by the conveyance of Stone to his two sons-in-law, was removed, and the land should then be resold for the benefit of the execution creditors and the proceeds of sale be divided in proportion to the amount of the debts, and *"that the interest of A. S. Perry should be applied as a credit to his debt, so as to diminish, by so much, the amount to be paid by Person as surety."*

Upon this state of facts Person, the surety of Stone, has a plain equity to be subrogated to the rights of his creditor and to have the benefit of any credit that ought to be applied to his debt upon a resale of the land of which the defendant Charles Perry cannot deprive him by any dealing with the creditor, A. S. Perry.

By way of supporting the averment that the proceeds of the second sale of the land, after the cloud on the title was removed, was to be applied *pro tanto* to discharge the debt on which Person was surety, the complaint alleges:

1. That the land was brought to sale at the instance of Person, and upon his undertaking to prosecute an action against the fraudulent donees of Stone.

2. That he did, after the sheriff's sale, employ counsel and institute an action in the name of A. S. Perry, to whom the sheriff's deed was made by the order of Mr. Davis, and prosecuted it with all diligence at his own expense, until his death.

The answer does not set out with clearness the grounds upon which the defense is put. It admits the fact that the execution creditors of Stone had levied on (699) the land; that Person was the surety of Stone on the debt to Perry; that Stone had made a conveyance of the land to his two sons-in-law, and that there was an understanding that Mr. Davis should bid in the land and have the sheriff's deed made to A. S. Perry for the benefit of the execution creditors in proportion to their respective debts, and that the amount bid—that is, ten dollars—was credited ratably upon the executions.

But the answer does not controvert or deny (unless it be done by implication) the allegation that the amount which should be realized by Perry upon a resale after the cloud upon the title was removed, was to be applied as a *credit on his debt*, nor does it controvert the allegation that the understanding was entered into at the instance of Person, and that he undertook, and actually did, at his own expense, institute an action for the purpose of removing the cloud upon the title. Without noticing these very material and specific allegations in the complaint the answer sets out in general terms a denial of any understanding by Mr. Davis and Perry, or either of them, with Person, that he was to have benefit from the transaction "in any respect whatever," and if there was any such understanding the defendant Charles Perry, who claims to be a purchaser from A. S. Perry for value, had no notice thereof.

His Honor held that the cause of action was confessed on the ground, we presume, that the answer does not controvert the main allegation on which the action rests, to-wit, that the amount which should be realized by Perry upon a resale, after the cloud upon the title was removed, was to be applied *as a credit on his debt;* for, if so, it would necessarily relieve Person, as surety, *pro tanto,* and he had a plain right under the equity of subrogation to enforce the understanding. I confess that at the opening of the case, on hearing the complaint and answer read, I had a strong impression that his Honor had taken a correct view of the answer. The principles of equity, supposing the plaintiff's allegation in respect to the understanding to be true, were too plain for (700) discussion. This was yielded by the counsel of the defendant, and so the case was narrowed down to one in respect to the construction of the answer.

After hearing the argument and giving the complaint and answer an attentive perusal, we have come to the conclusion that the answer does, by implication, controvert the allegation of the complaint above referred to for the averment that the land was to be held by Perry for the benefit of the "execution creditors," does furnish an inference that Perry was to take his part of the price for which the land could be resold and have the right to collect his judgment out of Person, which is inconsistent with the allegation in the complaint that Perry's part was to be credited on the judgment; and although the omission to deny the allegation that the action of the execution creditors was taken at the request of Person, and that he undertook to institute a suit and carry it on at his own expense, and actually did so prosecute the suit in the name of Perry, tends strongly to corroborate the allegation of the complaint, still these facts do not have the effect *per se* to make out the plaintiff's cause of action.

There is error, judgment reversed and *venire de novo.*

The parties will ask leave to amend the pleadings, if so advised, so that a distinct issue may be submitted to a jury, to-wit, "was it the understanding of the parties that the amount realized by A. S. Perry, upon a resale of the land after the cloud upon the title was removed, should be applied as a credit upon his judgment, so as to relieve Person to that amount. Or was it the understanding of the parties that the amount realized by A. S. Perry upon a resale of the land, after the cloud upon the title was removed, was to enure to the exclusive benefit of A. S. Perry, and that he was to be at liberty to collect his judgment out of Jesse Person, giving no credit on the judgment for what he should realize by a resale of the land.

This is the point on which the action turns, and it is to be regretted that the pleadings did not set out the case with clearness enough to have enabled the counsel to (701) frame these issues at the outset. We call attention to the question whether A. S. Perry, who is charged in the complaint with a breach of confidence, is not a necessary party.

PER CURIAM. Judgment reversed and *venire de novo.*

VIRGIL S. LUSK, assignee, v. P. F. PATTON.

A claim for services alleged to be illegal, when once adjusted and allowed by the parties in a settlement, cannot be set aside for its alleged illegality when presented by defendant as a set-off to the demand of the plaintiff's assignee.

(*Comrs. v. Setzer, ante,* 426, cited and approved).

CIVIL ACTION, motion to confirm a report of referees, before *Albertson, Judge,* Special (July) Term, 1873, BUNCOMBE Superior Court.

At Spring Term, 1872, the matter in controversy being an account against the defendant due the firm of B. J. & J. B. Alexander, of whom the plaintiff is assignee in bankruptcy, was referred by order of the Court to E. J. Aston and A. T. Summey, who at Special (August) Term, 1873, made a report.

Upon the coming in of the report the plaintiff excepted to it, assigning as grounds:

1. That it is grossly inaccurate and erroneous, and not responsive to the issues raised by the pleadings.

2. That the services rendered, upon which the counter claim endeavored to be set up by the defendant is founded, were illegal, and that payment thereof cannot be enforced either in this or any other proceeding.

(702) 3. That the referees do not specify either when or where a subsequent settlement was made.

4. That said report is vague, uncertain in its conclusions of facts, and contrary to law.

The defendant moved for a confirmation of the report (the material points in which are stated in the opinion of the Court), which motion his Honor refused, and sustaining the exceptions of the plaintiff set aside the report. From this judgment the defendant appealed.

J. H. Merrimon, for appellant.
A. T. & T. F. Davidson, contra.

RODMAN, J. The order of reference is like that in *Lusk v. Clayton, ante*, 184, and what is said in that case as to it, and as to the effect of the award, is applicable here.

The defense is that there were mutual accounts between the firm of Patton & Alexander and the defendant, which it was agreed should be set off against each other, and upon a settlement between the parties it was found that the firm was indebted to the defendant in a balance of $10. The award finds this defense true in fact and a sufficient one in law.

As the Judge set the award aside, we feel bound to examine as briefly as possible the reasons assigned in the exceptions to it. The first, third and fourth exceptions are either unfounded or have no weight.

The second is because the claim of the defendant was for feeding and keeping the horses which the firm used for carrying the mails under a contract with the Confederate Government. It is contended that this claim was illegal and could not be recovered on.

We pass over the question whether the award, being general, the Judge had any right to review it, either as to fact or law. We also pass over the question whether the defendant could have recovered against the firm for keeping their horses. For, however these questions may be, it is clear that when the firm *bona fide* paid the defendant's account by allowing it on a settlement, it was (703) the same thing as if they had paid it in cash, and money paid under an illegal contract cannot be recovered back. *Commissioners of Catawba v. Setzer, ante,* 426, at this term, and authorities there cited.

PER CURIAM. Judgment reversed and judgment for defendant.

BANK OF CHARLOTTE v. STENHOUSE & McCAULEY and others.

Where it was found on the trial below that the defendants were ready, able and willing and offered to pay in Confederate money the amount of two notes due the plaintiff soon after they fell due in February, 1864, which offer was refused: *Held,* that the offer to pay stopped the interest from the time it was made until the date or service of the summons in the action brought to recover the notes.

(*Bank v. Davidson, ante,* 118, cited and approved).

ACTION on two promissory notes, tried before *Moore, Judge,* Special (July) Term, 1873, Superior Court of MECKLENBURG.

The only question arising in the case was as to the effect of an alleged tender by the defendants, and upon which the following are the facts established by the evidence:

Stenhouse, one of the defendants, testified that after the maturity of the first note, and shortly before that of the second, he went to the plaintiff, the Bank of Charlotte, and proposed to pay the amount of the notes in Confederate money. He was told by the President of the Bank that the old issue of Confederate money was soon to be replaced by a new issue. That he, the President, would prefer that we would keep the money and use it until the new issue came out, and that he would then receive the new issue. He, the defendant, as witness, further stated that when the (704) new issue was in circulation, he again went to the defendant, to-wit, about 9 July, 1864, and offered to pay the amount of the two notes; that the president refused to receive it. This defendant further stated that he then had in his hands about seventeen thousand dollars in Confederate money, and that he was then ready, able and willing to pay the whole amount.

Another witness, one McDonald, a clerk of defendants, testified that he went to the plaintiff a few days after the occurrence above recited, and offered to pay the two notes in Confederate money, and that the president of the bank again refused to receive it. At the time the witness had in his hands twenty thousand dollars. This witness further stated that the defendants were able to pay the whole amount due.

Certain issues were submitted to the jury under the direction of the Court, who responded thereto as follows:

1. That the defendants were ready, able and willing to pay the notes due in February, 1864, on 9 July, 1864, and offered then to pay the same.

2. That the defendants used the funds they tendered to the plaintiff after the tender was made.

3. That there was on the 9th of July aforesaid a tender of $20,000 by defendants, and a refusal to receive the same by the plaintiff.

Upon the return of the verdict the counsel for the plaintiff moved for judgment against the defendants: 1. According to the dates of the original notes, for which the notes sued upon were given in renewal, as is alleged and not denied, as of their scaled value at that time with interest. 2. If that be refused, then for interest on the scaled value of the notes from the bringing of this action. These motions his Honor refused, and gave judgment for $1,722.05, of which $1,667.06 was principal money, the scaled value of the notes sued on at the date thereof, no interest being allowed by the Court between the date of the tender and the judgment. (705)

From this judgment plaintiff appealed.

Wilson & Son, for plaintiff.
W. M. Shipp and *Vance & Dowd, contra.*

RODMAN, J. This case is governed by the principles asserted in the case of the same plaintiff against Davidson, *ante,* 118, at this term. The notes must be scaled at their respective dates. In one respect only does the present case differ from that. Here the first tender was made a few days after one of the notes sued on fell due, and a few days before the other did. A second tender was made some days after both notes were due. Ordinarily, a plea of tender stating those facts would be bad. But the strict rules applicable to contracts to pay money in ordinary times require to be modified when applied to contracts made and maturing during the war and payable in Confederate money. As at the time of the first tender no objection was made by reason of the time of the tender, and payment was deferred at the request of the plaintiff and to prevent loss to him, we are of opinion that interest ought to stop from the time of the offer to pay until the service or date of summons in this action.

Judgment may be drawn accordingly. Neither party will recover costs.

PER CURIAM. Judgment accordingly.

(706)

WILLIAM CLARK v. D. M. WAGONER and others.

1. What are the *termini* or the boundary of a grant or deed is a matter of law; where these *termini* are is matter of fact for the jury. Therefore, where there was evidence tending to establish a certain corner at a particular place, it was error in the presiding Judge to say, as a conclusion of law, the corner was at a different place.

2. Where the defendants, deriving title under a grant dated in 1816, claimed up to a line from one point to another (which line was established and agreed to by all parties), exercising ownership by open and notorious acts, acknowledged and acquiesced in by those now claiming adversely since the date of the grant in 1816, the plaintiff's claim to the *locus in quo* extending to said line is barred by the statute of limitations.

(*Mode v. Long*, 64 N. C., 433; *Tatem v. Paine*, 11 N. C., 64; *Marshall v. Fisher*, 46 N. C., 111, cited and approved).

ACTION of ejectment (under our former practice), tried before *Mitchell, Judge,* Spring Term, 1873, Superior Court of IREDELL.

The facts pertinent to the points decided are sufficiently stated in the opinion of the Court.

Under the charge of his Honor below, the jury returned a verdict for the plaintiff. Judgment and appeal by defendant.

W. P. Caldwell, for appellant.
Armfield and *M. L. McCorkle, contra.*

SETTLE, J. This was a question of boundary, in which it became necessary to locate the calls of a grant to Samuel Houston worded as follows: "Fifty acres lying, etc., in Iredell County, on the Catawba river, including two small islands in said river. Beginning on a stake at the upper end of the island, thence south thirty-five degrees east fifty-three poles to a stake, the lower end of the island; thence east one hundred and twenty-six poles to a post-oak, thence, etc., to the beginning."

(707) And we think his Honor has fallen into two mistakes in the instructions he gave the jury:

1. As there was evidence from witnesses, and also some circumstances which tended to establish the second corner at the lower end of Island No. 1, it was error to say, as a conclusion of law, that it was at the lower end of Island No. 2.

What are the termini or boundary of a grant or deed is matter of law; where these termini are is matter of fact. The Court must determine the first, and the jury must ascertain the second. *Tatem v. Paine,* 11 N. C., 64; *Marshall v. Fisher,* 46 N. C., 111.

2. But a more important error is to be found in the instructions of his Honor as to the effect of the possession of the defendant and those under whom he claims.

Whatever confusion may arise from the uncertainty of the Houston grant, it is reasonably certain that those who located that grant, after leaving the islands, commenced at the white-oak on the main land, which is opposite the lower end of Island No. 1, and ran to the post-oak an agreed corner. And all parties have acted upon the assumption that the marked line between the white-oak and the post-oak was the boundary between the Houston and Kyle grants until 1872, when the plaintiff, for the first time set up a claim to the *locus in quo.* Those deriving title under the Kyle grant have claimed and exercised ownership up to that line since 1816, the date of their grant, and those claiming title under the Houston grant have acknowledged and asquiesced in that claim. This assertion of title has been evidenced, not only by the declarations of persons claiming under the Kyle grant, but by open and notorious acts of ownership, such as cultivating a portion of the *locus in quo* and taking timber from the whole of it. And the acknowledgment, by those claiming under the Houston grant, of the defendant's title, has been as open and notorious as his claim. The parties interested point out the line from the white to the post-oak as the boundary between them; when the neighbors are surveying other adjacent lands, and when bees are found in a marked tree on his line by Christopher Clark, a former owner (708) under the Houston grant, permission is asked by him and given Mrs. Campbell to cut the tree; a fence is put up by David Clark, a former owner on the line of marked trees, and permission obtained to put a few panels over the line in order to reach a bluff and turn stock, and the present plaintiff puts his hand on the white-oak and tells the defendant that it is the line between him and the Campbells; and further, the plaintiff acts as agent of Mrs. Campbell in selling the land to the defendant, and assists the defendant in selecting a site for a mill, and admits that the Campbells have always claimed title and had possession up to the line of marked trees.

The possession of the defendant and those under whom he claims, is neither "accidental nor trifling in amount," to use the words of his Honor; nor can it be said to be "by mistake," for there is no mistake in the fact their claim has been open, notorious and adverse to all the world for a longer period than the statute requires to create a bar. *Mode v. Long,* 64 N. C., 433.

Let it be certified that there is error, which entitles the defendant to a *venire de novo.*

PER CURIAM. *Venire de novo.*

Cited: Jones v. Bunker, 83 N. C., 327; *Strickland v. Draughan,* 88 N. C., 318; *Redmond v. Stepp,* 100 N. C., 218; *Brown v. House,* 118 N. C., 877; *Rowe v. Lumber Co.,* 128 N. C., 303; *Harper v. Anderson,* 130 N. C., 540.

(709)

ELIZABETH O. KNIGHT, administratrix, v. ARCHIBALD BRASWELL.

1. A bond payable "with interest from date, the interest to be paid annually," is due and payable from date, and does not require a demand upon the obligors for payment before suit brought.

2. A bond for the payment of money executed in May, 1860, by the principal and his sureties is by section 16, C. C. P., exempted from the operation of the statute of limitations as contained in sections 31 and 34, C. C. P.

3. Where a bond is made payable "with interest from date, the interest to be paid annually," the interest becoming due at the end of each year, is not barred by any statute of limitation that does not bar a suit on the bond itself.

(The case of *Bledsoe v. Nixon*, 69 N. C., 89, cited and approved).

This was a CIVIL ACTION tried at the last term of Edgecombe Superior Court, before *Moore, Judge,* when the plaintiff had a verdict and judgment, and the defendants appealed. The facts are fully stated in the opinion of the Court.

J. L. Bridgers, Jr., for the defendants.

(711) No counsel in this Court for plaintiff.

BYNUM, J. This is a civil action begun 27 March, 1873, on a bond, of which the following is a copy, to-wit:

"With interest from date, the interest to be paid annually, we promise to pay Joseph A. Englehart, Clerk and Master in Equity for Edgecombe County, five hundred and sixteen dollars and sixty-eight cents, for value received, this 28 May, 1860."

The defendant Braswell is one of the sureties thereon, and in his answer relies (1) on a want of demand made before action, and (2) on the statute of limitations barring actions against sureties after three years. C. C. P., secs. 31 and 34. The defendant's counsel relies upon the words in the bond, "the interest to be paid annually," as constituting a covenant of loan for one year at least, and so from year to year, until the contract is terminated by notice and demand. No authority is cited for this construction, and in the absence of any express provision in the bond to that effect, the

Court must give it that obvious and natural construc- (712)
tion which its wording implies, to-wit, that it is due
and payable from date, but if payment is postponed for one year or more then the interest shall be annually due and collectable. The covenant is inserted for the benefit of the covenantee and is not to be construed to his prejudice.

This construction of the bond disposes also of the second defense, to-wit, the statute of limitations; for, as the cause of action accrued before the C. C. P. went into effect, the 16th section of The Code expressly saves this and like cases from the operation of sections 31 and 34 of The Code, which bar actions against sureties after three years.

But the defendant says, if this be so, yet a part of the plaintiff's demand comes within the operation of the statute and is barred; for that in *Bledsoe v. Nixon,* 69 N. C., 89, it is held that when there is an agreement set out in the note for the payment of interest annually or semi-annually, the maker is chargeable with interest at the like rate upon each deferred payment of interest in like manner as if he had given a promissory note for the same amount; and that therefore here such annual accretion of interest becomes a separate cause of action, and it was error in the Court under this plea to render judgment upon the deferred payments of interest which accrued after the Code went into effect and more than three years before action begun.

In this case his Honor gave judgment by computing interest upon the note and adding thereto the interest upon each deferred payment of interest.

In this there is no error. There is but one contract and that is evidenced by the bond which covenants to pay interest annually. Interest is an incident of the debt—a parcel of the bond—and partakes of its nature and therefore is barred by the same lapse of time only which bars an action on the bond out of which it arises.

It has been repeatedly held that coupons, though cut off from the bonds and put in circulation as other nego-
tiable securities, still retain the dignity of the bonds (713)
from which they were separated, and an action upon
them is barred only as an action upon the bonds themselves. *The City v. Lamson,* 9 Wall., 483; *Lexington v. Butler,* 14 Wall., 282.

The ruling of his Honor upon both points is therefore sustained.

PER CURIAM. Judgment affirmed.

Cited: Faison v. Bowden, 74 N. C., 45; *Welfare v. Thompson,* 83 N. C., 279; *Capell v. Long,* 84 N. C., 19; *Joyner v. Massey,* 97 N. C., 150; *Scott v. Fisher,* 110 N. C., 314.

JOSEPH H. ETHERIDGE and others v. MILFORD VERNOY.

1. In contracts for the sale of land it is the duty of the purchaser to guard himself against defects of title, quantity, incumbrance and the like. If he fail to do so, it is his own folly, for the law will not afford him a remedy for the consequence of his own negligence.

2. If, however, representations are made by the bargainor which may be reasonably relied upon by the purchaser, and they constitute a material inducement to the contract and are false within the knowledge of the party making them, and they cause damage and loss to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief.

(*Walsh v. Hall,* 66 N. C., 237, cited and approved; *Lytle v. Bird,* 48 N. C., 222; *Fagan v. Newsom,* 12 N. C., 20; *Saunders v. Hatterman,* 24 N. C., 32; *Credle v. Swindell,* 63 N. C., 305, cited and distinguished from this).

This was a CIVIL ACTION, tried before *Albertson, Judge,* at Spring Term, 1873, of BERTIE Superior Court.

The action was brought by the plaintiffs as assignees of a penal bond of the defendant given to one Lewis T. Bond, to recover the residue of the moneys due thereon and for foreclosure of a mortgage executed at the same time, to secure the payment of the bond. The bond was in these words:

"Know all men by these presents, that I, Milford Vernoy, of the town of Rochester, county of Ulster and State (714) of New York, am held firmly bound unto Lewis T. Bond, of the county of Bertie and State of North Carolina, in the sum of eighteen thousand dollars, to be paid to the said Lewis T. Bond, or to his certain attorney, executors, administrators, or assigns, for which payment well and truly to be made, I bind myself, my heirs, executors or administrators, jointly and severally, firmly by these presents. Sealed this 26 February, 1866.

"The condition of this obligation is such that if the above-bounden Milford Vernoy, his heirs, executors or administrators, shall and do well and truly pay or cause to be paid unto the above-named Lewis T. Bond, his certain attorney, executors, administrators or assigns, the sum of nine thousand dollars in the following payments, viz., two thousand five hundred dollars, with interest, in one year from the date hereof, according to the conditions of a certain mortgage bearing even date herewith given for the better securing of the aforesaid nine thousand dollars, which said sum and interest, if paid without fraud and delay, then the preceding obligation to be void, otherwise to remain in full force and virtue.

"MILFORD VERNOY. [Seal.]"

Sealed and delivered in the presence of N. Williams.

On said bond were endorsed sundry partial payments as follows:

"Received of Milford Vernoy twenty-five hundred dollars on account of this bond. 15 May, 1867.

"$2,500. W. A. MEBANE,
Per L. S. WEBB.

"Received the interest also, $182.50.

L. S. WEBB,
For W. A. MEBANE."

"Received of Milford Vernoy five hundred dollars, on amount due Mrs. H. A. Benbury, as administratrix. 10 April, 1869."

The bond was on the 18th day of February, 1867, and before any payment became due, in writing, assigned by the said Lewis T. Bond to the plaintiffs for full value paid him without notice of any counter claim or deduction demanded of the amount due then. (715)

Other payments were also made by defendant which are not endorsed on the bond, but are stated in the answer and admitted in the pleadings.

The bond of defendant was secured by a mortgage made by the defendant at the same time and conveying certain lands lying in Bertie and Martin, which was properly proved and registered in those counties, a copy of which accompanies this case marked "A," the separate tracts are herein stated to contain one thousand acres more or less. The defendant claims an abatement from the amount due on his bond by reason of an alleged deficiency in the number of acres in each of the tracts which he had bought from said L. T. Bond, which Bond conveyed to him by deed dated .... day of ...., 186.., duly proved and registered in said counties, a copy of which is herewith filed and made part of the case. In the deed last named the tracts are described as containing respectively 1,226 and 1,200 acres more or less, and they are the same tracts conveyed by the mortgage. The contract price for both tracts of land was $13,000, of which $4,000 was paid in cash, and the residue secured by the bond and mortgage aforesaid. Certain issues, filed with the record, were submitted to a jury.

It was in evidence that the sale was made and the price agreed upon, upon the representation by the vendor Bond that each tract contained a thousand acres, but the execution of the deed was deferred until a survey of the Bertie tract could be made. Before that survey was made the defendant executed his bond for the purchase-money and his mortgage securing its payment and delivered them to the plaintiff, when the mortgage was immediately proved and registered. Thereafter a survey of the Bertie tract and the deed from Bond to the defendant executed, describing that tract to contain 1,226 acres, as reported by the surveyor. The (716) deed from Bond to the defendant was not executed until two months after the execution of the bond and mortgage, though it bears the same date. The Bertie tract in fact contains 1,124 acres only. It did not appear that any survey of the Martin tract had been made as described in Bond's deed, but a survey was made of a tract called the Bond tract, which was proved to contain 714 acres; that the lines as surveyed were part of those designated in the deed of Bond, and that after running out the first line the second line was not run east, nor along any lines called for, nor marked trees, but directly to the southern terminus of a line of a patent not called for nor in any manner referred to in the deed, that the lines of adjoining tracts called for in running the second line were not found nor regarded, and that if the second line had been run due east to a point opposite and nearest to the Bond and Thompson line, which is called for and known, and then direct to that line the tract would contain nine hundred and forty-five acres; that it had once been thus surveyed and run, and was found to contain 945 acres as stated. The defendant admitted there was no fraudulent misrepresentation made by Bond as to the quantity of the land at any time, nor was there any evidence tending to show that he did not honestly estimate and believe the tracts to contain the full number of acres as described in his deed. At Spring Term, 1872, of the Court an order in the case was made directing a survey of the lands and appointing one J. E. Moore, a surveyor, to make the survey in order to an accurate calculation of the acres of each tract; Moore made the survey and maps thereof and returned them to the following Court. These maps represented the two tracts as containing more land than is found by the jury. Moore was not present at the trial. He had been paid for his survey by order of the Court.

The plaintiff proposed to exhibit the maps to the jury as evidence of the quantity of the land as therein estimated by the surveyor. This evidence was objected to by the defendant and ruled out. The plaintiffs excepted thereto.

The defendant offered evidence of the present value of each tract, with a view to ascertain its value in (717) 1866 when sold. This evidence was objected to by plaintiffs and admitted. Plaintiffs excepted.

The defendant also proposed to prove by one Stone, a witness, that witness during the summer of 1872, on the swamp land in Martin County, cut and carried off a certain number of logs from sixteen acres of the land, which logs he hauled to the river bank and thence transported and sold in market, and after deducting expenses the proceeds of sale left a profit of about $15 per acre. This evidence was objected to by plaintiff and admitted by the Court. Plaintiffs excepted.

The defendant further proposed to show that there was a large quantity of cypress and ash timber on this Martin tract and its market value upon measurement by the foot, when cut and conveyed to market. This evidence was objected to by the plaintiffs and admitted by the Court. Plaintiffs excepted.

The plaintiffs insisted:

1. That upon the fact, and notwithstanding the finding upon the issues, they were entitled to recover the entire amount due on the bond.

2. That if any abatement were to be allowed, it should be only on the deficiency in the acres of the Martin tract, the deficiency in the acres of the Bertie tract not warranting any claim for deduction.

3. That the boundaries of the tract as described in the deed being definite, fixed and well known to the defendant, and he having acquired title to the entire tracts, thus ascertained and defined, the defendant, in the absence of fraud and intentional misrepresentation, is not entitled to any deduction.

4. That the misrecital of the quantity of the land being accurately ascertained and defined in the deed, furnishes no ground for a claim for deduction.

5. That the plaintiffs having purchased the bond before maturity and for full price and without notice of the defendant's claim, are not affected thereby.

6. That if the defendant had an equity or counter (718) claim, he has lost it by his delay to assert it, and cannot now do so against the plaintiff's assignees.

The Court rendered judgment abating the plaintiffs' debt for the whole deficiency in both tracts of land according to the findings of the jury. From the judgment and the ruling of the Court, as set out in the case, the plaintiffs appealed to the Supreme Court.

The following are the exceptions taken by the plaintiffs:

1. For that the Court admitted evidence to the jury of the present value of the land on which deductions are claimed.

2. For that evidence was admitted of the extent and kind of timber on the land in the year 1872, and of the value thereof at that time.

3. For that evidence was admitted of the timber cut on fifteen acres of land in . . . ., conveyed to market and sold, of the expenses thereof and net proceeds of sale as affecting the measure of defendant's claim.

4. For that evidence was admitted of the value in market of such timber by the foot.

5. For that evidence offered by the plaintiff of the survey

and map made and returned to the Court by the surveyor appointed by the Court to make such survey, was rejected.

6. For that judgment was rendered for an abatement of the plaintiff's debt for the whole deficiency in both tracts, such deficiency being found upon the number of acres mentioned in Bond's deed only.

7. For that any abatement was allowed in the deficiency in the Bertie tract.

8. For that the verdict was allowed to stand upon the issues as to the Martin land, when no survey had been made of that tract as described in Bond's deed and without any evidence of its boundaries if run according to such deed.

Smith & Strong (with whom were *Gilliam & Pruden*), for the appellants.

Barnes and *W. W. Peebles, contra.*

BYNUM, J. In contracts for the sale of land, it is the duty of purchasers to guard themselves against defects of title, quantity, encumbrances and the like; (724) if they fail to do so, it is their own folly, for the law will not afford them a remedy for the consequences of their own negligence. But if representations are made by the bargainor, which may reasonably be relied on by the purchaser, and they constitute a material inducement to the contract, and are false within the knowledge of the party making them, and they cause damage and loss to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief. *Walsh v. Hall,* 66 N. C., 233.

The maxim of *caveat emptor* is a rule of the common law, and applies as well to contracts of purchase of real as personal property, and is adhered to in courts of equity as well as of law, in the absence of fraud. The purchaser's only right of relief is to be found in the covenants in his deed where there is no fraud. Rawle, 459. If he has taken no covenants and there is no fraud vitiating the contract, he has no relief for defects in quantity, quality or encumbrances, for it was his own folly to accept such a deed when he could, and it was his duty to protect himself by covenants. In *Lytle v. Bird,* 48 N. C., 222, it was held that an action of deceit would not lie for a fraudulent representation upon the sale of a tract of land, as to where certain lines run, and as to particular lands being included in the deed. There *Nash, C. J.*, says: "If the plaintiff, by using reasonable diligence, could have ascertained the truth, it was his own folly to trust to the representations of the vendor." The same principle is announced in *Fagan v. Newsom,* 12 N. C., 20, and in *Saunders v. Hatterman,* 24 N. C., 32. Another case in point is *Credle v. Swindell,* 63 N. C., 305, where it was held that an action for deceit would not lie for the vendee against the vendor for false representations by the latter, as to the quantity of land sold. There he falsely asserted the (725) tract to contain four hundred and ten acres, when in fact there were two hundred and eighteen acres only. In delivering the opinion of the Court, *Settle, J.*, says: "If the plaintiff has sustained loss, it is by his own negligence; he has not exercised that diligence which the law expects of a reasonable and careful person, but was willfully ignorant of that which he ought to have known. He might have ascertained the fact by an actual survey or taken a covenant as to quantity. *Vigilantibus non dormientibus jura subveniunt.*" It is thus seen that even fraud in the misrepresentation will not entitle the vendee to relief, unless that fraud is such that the plaintiff could not have reasonably provided against it under the maxim, *caveat emptor*.

It is admitted in our case that no fraud was intended or used, but that the vendor fully believed his statements as to the quantity of land to be true. So, according to the entire current of decisions in our State, the defendant is entitled to no abatement in the price for a deficiency in quantity. There must be fraud and damage. Adams Eq., 176; 2 Kent Com., 486-7.

Bond, the vendor in this case, at the time the contract of sale was made, stated that the quantity of land in each tract was a thousand acres, and the trade was made on that basis. It turned out, according to the finding of the jury, that one tract contained 1,124 acres, and the other 714 acres, and the two tracts together showed a deficiency of 162 acres. It is not set up in the answer or shown by any evidence that quantity was the material or any inducement to the trade, and the fact that the defendant occupied and used the lands, without complaint or enquiry, for eight years succeeding his purchase, and until he was sued for the purchase-money, affords a strong presumption that the quantity was not the material consideration with him. As we hold that the defendant is not entitled to the abatement and sum found by the jury, it is unnecessary to consider the other questions presented in the exceptions.

The judgment is reversed and judgment rendered (726) here for the plaintiffs. It is referred to the Clerk to ascertain the balance due on the bond.

PER CURIAM. Judgment reversed and judgment for the plaintiffs.

Cited: S. C., 71 N. C., 184; *Foy v. Haughton,* 85 N. C., 173; *Ramsey v. Wallace,* 100 N. C., 82; *Woodbury v. Evans,* 122 N. C., 781; *Smathers v. Gilmer,* 126 N. C., 759; *Shankle v. Ingram,* 133 N. C., 257.

WILLIAM H. BROTHERS and others v. THE COMMISSIONERS and SHERIFF OF CURRITUCK COUNTY.

There is nothing in the Constitution of the State which prohibits the commissioners of a county from taxing polls to pay a county debt incurred before 1868; and there is nothing in that instrument fixing a miximum of taxation for such purpose.

(*Street v. Comrs., ante,* 644, cited and approved).

SETTLE, J., dissenting.

MOTION to dissolve an injunction, heard before *Pool, Judge,* Fall Term, 1871, Superior Court of CURRITUCK.

The following is the case as settled and sent up to this Court:

The plaintiffs applied for an injunction restraining the defendants from collecting certain taxes, and his Honor directed the restraining order to be issued by the Clerk upon his taking the proper bonds, etc., and that defendants should be notified to appear and show cause, etc. Defendants appeared and insisted that the injunction should be dissolved, for the following reasons:

1. That the bond was insufficient, for the reason that there was but one surety. This the Court overruled, and the defendants excepted.

2. That the security, although he had himself justified, was insufficient. Evidence being submitted by defendants to show that the security was insufficient, (727) and by the plaintiffs to the contrary, his Honor adjudged that the security offered was sufficient, upon which defendants again excepted.

The Court found the following facts: The county of Currituck, before the war and by proper authority, had issued coupon bonds to the amount of fifty thousand dollars, running thirty years, with interest payable semi-annually. A large amount of interest had accrued and many suits had been brought to recover the value of the coupons. Judgments were obtained, and a peremptory *mandamus* issued to the commissioners to levy a tax to pay the same. In obedience to this peremptory writ, and by a special act of the General Assembly, a special tax of five thousand dollars was levied to pay the interest. In levying this tax the commissioners governed themselves by the equation of taxation, and levied the same amount upon the poll as upon every three hundred dollars worth of property. The result of this levy was that the poll tax, including the poll tax levied for school purposes and for the maintenance of the poor, exceeded largely the sum of two dollars on the poll. His Honor being of opinion that this levy of a poll tax exceeding two dollars on the poll was unconstitutional, and that no poll tax of any amount could be levied for any other purpose save that of carrying on the public schools and maintaining the poor, as to the excess directed the injunction to be made perpetual restraining the defendants from collecting any excess of two dollars on the poll.

From this judgment defendants appealed.

Attorney-General Hargrove, for appellants.
Busbee & Busbee, contra.

RODMAN, J. The questions presented in this case are all decided in the case of *Street v. Comrs., ante,* 644, at this term, with one exception.

The levy was there objected to because the commissioners had laid no tax, or a merely nominal one on polls, and two dollars on the one hundred dollars value of (728) property, to pay a debt of the county incurred before 1868. Here the objection is that the commissioners have laid a tax on polls in the proportion to that on property which the Constitution prescribes for ordinary State and county purposes. In that case it was held that it was not the intention or effect of the Constitution to impose any restraints on the power of the county authorities, either in the way of limitation of the maximum, or in the way of proportion or equation between the taxes on polls and property, but that they had a discretion. Consequently the levy in that case was held good. As there is nothing in the Constitution which prohibits the commissioners of a county from taxing polls to pay a county debt incurred before 1868, so there is nothing fixing a maximum of taxation for such a purpose. The obligation to pay the debt is recognized; all the subjects of taxation are liable to it, and it is within the discretion of the commissioners to regulate assessments both as to amounts and subjects, according to their views of equity and good policy.

PER CURIAM. Injunction dissolved and case remanded. Defendants will recover costs in this Court.

SETTLE, J., dissenting. I do not concur in the opinion of a majority of the Court that the county commissioners may exceed the limit of two dollars on the poll for the purpose of paying the indebtedness of the county existing previous to the adoption of the present Constitution, or indeed for any other purpose.

"The State and county capitation tax combined shall never exceed two dollars on the head." "The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor." Constitution, Art. V, secs. 1 and 2.

It is clear that the limit of two dollars on the poll cannot be exceeded for the payment of any debt, (729) State or county, contracted since the adoption of the Constitution, for the whole of the poll tax is specifically appropriated to the purposes of education and the support of the poor.

And it is equally as clear that it was the intention of the framers of the Constitution that no part of the poll tax can be applied to the payment of the old State debt, as it is called, for they ordained, Art. V, sec. 4, that "The General Assembly shall by appropriate legislation and by adequate taxation provide for the prompt and regular payment of the interest on the public debt, and after the year 1860 it shall lay a specific annual tax upon *the real and personal property* of the State, and the sum thus realized shall be set apart as a sinking fund to be devoted to the payment of the public debt."

In other words, the State cannot tax the poll for the payment either of the new or of the old State debt. Nor can the county tax the poll for the payment of new county debts, because the poll tax is otherwise specifically appropriated by the Constitution.

And yet the opinion of the majority holds that the county may tax the poll for old county debts, notwithstanding it is ordained by Art. V, sec. 7, of the Constitution that: "The taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax except for a specified purpose, and with the special approval of the General Assembly."

It is true that by the recent amendments, sec. 4 of Art. V is stricken from the Constitution, but that does not affect this case, nor does it in my opinion affect in the least degree the argument. It is evident that the only reason for striking this section from the Constitution was to avoid levying taxes for the payment of either the interest or the principal of the State debt. No one ever supposed for a moment that striking out this section would affect in any degree the tax on the poll.

It cannot be said that as you could tax the poll previous to the adoption of the present Constitution, and when (730) the old county debts were contracted, that you cannot now take it away from the subjects of taxation because you would thereby violate the obligations of those contracts, for it is a well-established principle that you may diminish the subjects of taxation without impairing the obligation of contracts, provided you leave enough from which the taxes may be raised, and the Constitution does leave all the property of the State, which is amply sufficient.

It is manifest to my mind that the spirit of the Constitution requires that the taxes be taken from the poll, except to the extent of two dollars, to be applied to the purposes of education and the support of the poor and be placed upon the property of the State. It is at least an ungracious exercise of sovereignty to tax a man's head, especially when he has nothing else to tax. But perhaps it would all be well enough, provided all the taxes thus collected be applied to the wise and humane purposes prescribed by the Constitution.

Cited: Clifton v. Wynne, 80 N. C., 147; *Barksdale v. Comrs.,* 93 N. C., 482; *Blanton v. Comrs.,* 101 N. C., 536.

JANE C. HINTON v. DAVID HINTON, executor, etc.

1. A party plaintiff has no right to have a decree reheard by which certain lands were directed to be sold (and which afterwards confirmed the sale), when such party is in no way interested in the proceeds of sale and did not ask a sale in her original complaint.
2. Where an executor is authorized to sell the lands of his testator in his discretion, this Court will not interfere by entertaining an application for a license to sell. Such an executor may be compelled to sell when third persons have a right to compel him to do so, and the Court will restrain an abuse of his discretion.

PETITION filed in this Court to rehear a decree made in a certain suit at January Term, 1869, wherein the petitioner was plaintiff, and the defendant David Hinton was defendant.

The facts are fully stated in the opinion of the Court.

Mason, W. N. H. Smith and *Devereux,* for petitioner.
Moore & Gatling, contra.

RODMAN, J. The original action in this case was by the plaintiff to recover of the defendant, who is the executor of

Laurens Hinton, and the testamentary guardian of his children, compensation for the board and other expenses of the children for several years, and to compel him to sell the lands of the testator for the purpose of enabling him to pay it. At January Term, 1869, of this Court the Court adjudged a certain sum due to the plaintiff, and decreed that the defendant sell so much of the lands as might be necessary to pay the debt. The defendant sold two pieces of land to the plaintiff for a sum more than sufficient to pay her debt. The sale was confirmed at January Term, 1870, and the plaintiff was afterwards paid. The decree confirming the sale authorized the defendant to sell the residue of the lands. Afterwards the defendant did sell the residue of the lands to Wynne & Hayes, and at January Term, 1871, that sale was reported and confirmed. The present petition asks that so much of the decree of January Term, 1870, as authorizes a sale of the residue of lands, and the decree of January, 1871, confirming the sale to Wynne & Hayes, be reheard and reversed, and consequently the sale set aside.

The first question which occurs is, what interest has the plaintiff in the decrees which she seeks to have reheard. She does not represent the children, who were the owners of the land. Her debt was paid and satisfied before that part of the decree of 1870 which she complains of was made, or it must be regarded as having been so paid. When that action was done the action was at end as to her, and it continued in Court for any purpose not connected with the first sale merely as the *ex parte* application of the defendant. That part of the decree of 1870 which is complained of was not (732) asked for by her in her complaint, and was not necessary for her relief. It may have been erroneous, or not, but she is not aggrieved by it, and cannot be heard to complain.

Our opinion on this point being decisive of the case made by the petition to rehear, we might go no farther. But the petition alleges that great damage has been done to the children by the second sale, and although it does not charge the defendant with fraud it imputes a recklessness and imprudence injurious to the children. The argument deduced from this calls for some observations.

The defendant was authorized by the will of his testator to sell his lands in the exercise of a discretion. Where an executor has such a power a Court will not entertain his application for an order, or a license to sell, for the reason that the license, or order, would be superfluous and nugatory.

If the Court, by inadvertence or from ignorance of the fact of his power to sell, should make such an order, it would not, the heirs being no parties to the proceeding, in any way affect their rights as between the executor and them. A trustee with a discretion to sell may be compelled to sell when third persons have a right to require him to do so, and a Court will restrain an abuse of his discretion. A Court will also advise a trustee upon a case of facts as to doubtful matters of law. But a trustee, with a discretion, can never, by his own act, throw off upon a Court his responsibility to his *cestui que trusts* for a faithful exercise of his discretion. Considering the decrees complained of as being as between the defendant and the children of the testator as if they had been obtained on his *ex parte* application, they would form no bar to any action by the children charging upon the defendant an unfaithful and fraudulent use of his powers.

There are also persons interested in the sale other than the children and the executor, viz., the purchaser, and we apprehend that, as against them, it would not be sufficient in order to set aside a sale after its confirmation to show fraud on the part of the executor, but it would be
necessary also to show a guilty participation in the (733)
fraud on their part.

We do not, of course, undertake now to say what would be our decision in a case to which the children were parties. It would necessarily depend on the nature of the case made. But we are strongly inclined to think that an application by them to set aside the decrees complained of would not be entertained in the absence of an allegation of fraud, both in the defendant and in the purchaser. The defendant has done through this Court only what he might have done under the will without the aid of the Court, and the children are in nowise injured by the decrees. If the defendant has been an unfaithful trustee their remedy is unimpaired. And there is no suggestion of any fraud in the purchasers.

PER CURIAM. Leave to have the decrees reheard refused.

G. W. CLODFELTER v. JOSEPH BOST, guardian.

1. An action against a guardian for an account and settlement with his ward should commence in the Probate Court. The mistake in the jurisdiction (as an irregularity) is cured either by waiver, as when defendant answers the complaint or otherwise pleads to the merits, or by the operation of remedial statutes.
2. The Act of 1866-'67, chap. 59, sec. 2, allowing jury trials in certain cases, is repealed.
3. When the defendant, in 1854, took the guardianship of the plaintiff, who, as heir of a soldier killed in the Mexican War, was entitled to a pension from the United States Government, which facts within the knowledge of the guardian were sufficient to put him on enquiry as to such pension, and where the guardian had been remiss in other duties: *Held*, that he was responsible for such pension from 1854 until his ward became of age.

ACTION on a guardian bond, tried by *Mitchell, Judge,* Fall Term, 1873, of CATAWBA Superior Court.

The facts upon which the decision in this Court (734) rests are fully stated in the opinion of *Justice Bynum.*

Both plaintiff and defendant, being dismissed with the rulings of his Honor on the trial below, appealed.

Schenck and *Smith & Strong,* for the plaintiff.
Armfield and *McCorkle & Bailey*, for defendant.

BYNUM, J. The defendant, in January, 1854, became the guardian of the plaintiff in place of one Rufus Clodfelter who had been removed.

The father, the plaintiff, died 15 September, 1847, from the effect of wounds received in battle as a soldier in the war with Mexico, and the plaintiff, who was his only child, was entitled to a pension from the government of the United States by virtue of the laws thereof, from his birth, to-wit, 1 June, 1845, until the age of sixteen, to-wit, 1 June, 1861, when the said pension, by law ceased, and is not now recoverable. Upon complaint and answer it was referred to the Clerk of the Court to take the account, which he did and reported to Fall Term 1873, when exceptions thereto were filed and argued by the defendant, but were overruled by the Court, and the report was confirmed. At the same term of the Court the defendant claimed a jury trial upon the question of "diligence or negligence," under the provisions of chap. 59, sec. 2, Acts of 1865-'67, which his Honor refused. The defendant then moved to dismiss the action for the want of jurisdiction, which motion was allowed, and the plaintiff appealed from the other rulings which were adverse to him.

1. First as to the jurisdiction. The action should properly have begun in the Court of Probate, as the Court of original jurisdiction, but as the Superior Court had appellate jurisdiction of the same subject matter, the mistake of jurisdiction could be cured, as an irregularity, either by waiver, or by the operation of remedial statutes.

The defendant admitted the jurisdiction by putting in an answer to the merits and therein sub- mitted to an account, filing exceptions to the report and allowing the same to be confirmed by the Court before he moved to dismiss. It was too late. *Sumner v. Miller,* 64 N. C., 688.

Chap. 108, Acts of 1870-'71 and chap. 175, Acts of 1872-'73, were enacted to remedy the mistakes of jurisdiction and apply to such cases as this, as we have held more than once at the present term of the Court. It was, therefore, error to dismiss the action for want of jurisdiction.

2. Had the defendant the right of a trial by jury upon the question of "diligence" under the provisions of chap. 59, sec. 2, Acts of 1866-'67?

It is not necessary to decide a question made in the argument, whether that act is not unconstitutional as an infringement upon the essential powers of the Judiciary by making that a question of fact which is only a question of law. We have in *Armfield v. Brown, ante,* 27, declared the said act to have been repealed by subsequent legislation, and for the reasons stated in that case.

In our case, then, all the facts are found by the referee, and upon review again found by the Judge, and the only question before us is do the facts found, in law, make the defendant liable for the pension?

"Hard cases are the quicksands of the law." Bost has made no profit out of the guardianship, and we would be disposed to save him from loss if we could without violating the well-settled principles which govern such trusts. The loss must fall somewhere—either upon the infant, who was unable to protect himself, or upon him who assumed the responsibility of the parental office and undertook to take charge of the estate and manage it with prudence and care and by whose negligence the estate is lost.

We do not rest the decision upon the maxim that "all men are presumed to know the law," and therefore the defendant must have known that his ward was entitled to a certain pension under the acts of Congress. To put (736) his liability upon that would be a harsh rule, and in this case, perhaps, not a sound one. But his liability arises upon the application of another and more just principle, to-wit, a want of due diligence in the discharge of his known duties and the loss resulting therefrom. The defendant has been singularly remiss and forgetful of his trust, and seems to have lost sight of his ward and his affairs from 1858 until the institution of this action in 1869.

In his answer, under oath, he denies that he had ever received into his possession any lots or lands of his ward in Florida, but on his examination, as a witness, he admits that he did take them in possession. In his answer he denies having received from the former guardian a watch belonging to his ward, but in his evidence he admits having received it. In his answer he denies all knowledge that his ward's father had been killed in Mexico, but in his testimony he admits that it was the current report, and that he had no reason to doubt it. He admits that since 1858 he made no inquiries about the property in Florida, except that he thinks he tried to open a correspondence about it once during the war.

Thus he knew that his ward's father had been killed as a soldier in Mexico and that the plaintiff was his only child and heir at law. It was therefore his duty to enquire and ascertain whether the father owned any estate or rights of property which would fall to his ward. Such an enquiry would probably have led him to a knowledge of this right of pension. But he made no enquiries and appears to have lost sight of his ward and of his trust.

We conclude that all the facts which were within his knowledge were sufficient to put the defendant upon the enquiry as to the pension, and this, added to his negligence in the matters before referred to, properly subject the defendant to the payment of the pension money lost by his default.

But what is the extent of his liability? There had been former guardian up to 1854, and the pension was due from the birth of the ward in 1845 until 1854, until Bost became guardian. The report does not show whether the former guardian had collected the pension to the time (737) of his renewal or not. In the absence of proof we must assume that he discharged his duty and collected the pension to the time of his removal. The defendant would therefore be liable for the pension which accrued from 1854 to 1861, when the ward reached the age of sixteen and the pension ceased. But the defendant was also the surety of the former guardian in a bond of $100, and as he is insolvent and a defaulter, the defendant is liable in the penalty of the bond, to-wit, $100, which must be added to his other liability.

The Clerk of this Court will reform the report in accordance with this opinion, to-wit, by deducting therefrom the pension and interest thereon charged from 1 June, 1845, to January, 1854, and by adding to the balance found due $100, the penalty of the said guardian bond.

The judgment dismissing the action is reversed, and judgment here for the amount found due in reforming the report.

PER CURIAM. Judgment reversed.

MEMORANDA.

(740)

In the statement of the case of *Bratton v. Allison, ante,* 498, a copy of the note upon which the action is founded was by mistake omitted. The note given in South Carolina was of the following tenor, to-wit:

"$7,000.

"One day after date, for value received, I promise to pay to S. E. Bratton, or bearer, seven thousand dollars; interest to be paid annually, otherwise to become principal.

"Witness my hand and seal, 8 December, 1854.

"J. Allison. (Seal.)"

The provision in regard to interest fully explains the rule laid down in the opinion of the Court as to its computation.

THEODORE N. RAMSAY v. H. J. MENNINGER, Secretary of State, and W. M. BROWN.

MANDAMUS.

The following case, involving an important constitutional question, heard and determined by his Honor *Judge Moore,* at chambers in Wake County, 23 February, 1872, is published, at the request of many of the profession, for the purpose of preserving, so far as possible, the judicial decisions on those points of the Constitution of 1868 which are of general public interest.

The facts are fully set out in the opinion of *Judge Moore.*

OPINION OF THE COURT.

The plaintiff alleges that on 15 February, 1872, he contracted with the State, through a joint committee of the General Assembly, to do the public printing of the several departments of the State government; that he had executed his bond binding himself, his executors and adminis- (741) trators for the performance of the contract; that he demanded of the defendant Menninger, as Secretary of State, certified copies of the public laws, etc., as passed by the General Assembly at its recent session, in order that he might print the same, with which demand the Secretary of State refused to comply, alleging that the defendant W. M. Brown had been duly appointed to the office of State Printer and that he was entitled to the printing for the State government; that the said Menninger is about to deliver the printing to said Brown, to the injury of the plaintiff, and that he is ready, willing and able to comply with his contract.

And the plaintiff demands judgment:

First. That a writ of *mandamus* issue commanding Menninger, Secretary of State, to deliver to him certified copies of the public laws, etc., to be printed.

Second. That in the meantime an injunction issue restraining the said Menninger, Secretary of State, from delivering and the said Brown from receiving copies of said laws, etc., or any part thereof.

The defendants admit the matters of fact as set forth in the complaint, but allege that Brown is an officer of the State government, to-wit, State Printer, whose duty it is to print said laws, etc., and that the plaintiff has no rights in the premises.

The facts being admitted, the only matters in controversy are questions of law.

All irregularities in the proceedings were waived and the judgment of the Court demanded on the merits of the case.

The questions presented are:

1. What is the difference between a contract or employment and an office?

2. Is the plaintiff a contractor or a public officer?

3. If there be no such officer as State Printer, did the General Assembly have the power to make the contract as set forth by the plaintiff?

The first, most important and most difficult question (742) is: Wherein does an office differ from a mere employment? Duties are attached to both relations, and these duties may be identical, whether the person performing them is a contractor or an officer.

In an office there must be continuity of duty and succession among the incumbents, both of which characteristics are absent in an employment or contract.

Again, the duty under an office attaches to the office itself, and is prescribed by the regulations of government either in the shape of laws or by other competent authority, which duty must be performed by the incumbent for the time being, *independent of contract,* and if the office became vacant the duty and the office survive and devolve upon his successor; while under a contract or employment the particular duty may be the same as under an office, yet it does not continue beyond the life of the contractor unless the contract is unperformed, in which event his personal representatives must execute it as in other cases of contract. But the distinction is in this, that *there is no official successor.*

The duty arises out of the contract and ends with it; it attaches to the person making the contract; it is not governed by general laws nor regulations made touching the employment itself independent of the person exercising the employment.

"The duty" of an officer may consist in the performance of one act or many acts during his term of office.

The General Assembly at its session of 1870-'71 abolished the office of State Printer, and directed the printing to be done by contract.

In my opinion they had the right so to do. See *U. S. v. Mauner,* 2 Brock, 96; *U. S. v. Hartwell,* 6 Wall., 385; *University R. R. v. Holden,* 63 N. C., 410; *Worthy v. Barrett,* 63 N. C., 199; *Clark v. Stanly,* 66 N. C., 59.

It follows that the plaintiff Ramsay is a contractor, entitled to the public printing, according to his contract, and that the defendant Brown has no rights in the premises to the public printing.

The weight of responsibility resting on me to decide these most difficult questions is greatly lessened (743) by the reflection that the defendants can, on appeal, have my judgment reviewed by the Supreme Court, now in session, a tribunal that can make that certain which is now uncertain, and can correct my errors, if any I have committed. Before closing this opinion it is proper that I should particularly notice one of the arguments of the plaintiff.

It was contended that the decision of the Supreme Court at this term in *Clark v. Stanly is not law,* and I was seriously urged to disregard it. Disregard of law leads to anarchy.

It is the duty of all persons at all times to obey the laws; but more especially so of the Judges, whose sworn duty it is to uphold and enforce them.

Insubordination is no more to be tolerated in the judicial than in the military department of the government.

The decision of *Clark v. Stanly* does not conflict with my judgment in this action.

The motion for the injunction is disallowed, with costs to be taxed against the plaintiff in favor of Brown, as the Secretary of State has the right to deliver as many copies of the laws, etc., as he chooses to any one who may apply for them, and it is his duty to do so, if his fees are tendered.

The motion for the writ of *mandamus* is allowed.

The plaintiff will recover his costs against the defendant Menninger.

(744)

PROCEEDINGS OF THE SUPREME COURT, AND OF THE BAR OF NORTH CAROLINA, IN RESPECT TO THE MEMORY OF THE LATE JUSTICE BOYDEN OF THE SUPREME COURT, IN THE SUPREME COURT ROOM, 28 JANUARY, 1874.

In accordance with a previous notice, at 1 o'clock P. M., 28 January, 1874, the members of the legal profession in attendance on the Supreme Court and resident and sojourning in the city of Raleigh, assembled in the Supreme Court room for the purpose of giving expression to their feelings in regard to the death of the Honorable Nathaniel Boyden, late an Associate Justice of the Supreme Court of North Carolina, who has died since the last term of said Court.

There were present Chief Justice Pearson and Associate Justices Reade, Rodman, Settle and Bynum of the Supreme Court; Attorney-General Hargrove, Judges Cloud and Moore of the Superior Court; and Attorneys W. H. Bailey, Col. S. B. Spruill, J. T. Carson, Josiah Collins, T. G. Wilson, H. W. Guion, Gen. R. Barringer, A. M. Lewis, J. M. McCorkle, James Masten, Gen. A. M. Scales, M. A. Moore, R. F. Armfield, William M. Shipp, W. P. Williamson, D. G. Fowle, Hon. W. H. Battle, Hon. W. N. H. Smith, D. Schenck, D. M. Carter and S. A. Ashe.

On motion of J. H. Wilson, Esq., the Hon. R. M. Pearson was called to the chair and R. F. Armfield appointed secretary.

On motion of J. H. Wilson, Esq., a committee of five, consisting of J. H. Wilson, Hon. W. H. Battle and Judges Moore, Bynum and Cloud, were appointed by the chair to present resolutions expressive of the feelings of the meeting. The committee retired, and after consultation returned, and through their chairman, J. H. Wilson, Esq., presented to the meeting the following:

The death of Hon. Nathaniel Boyden, one of the Justices of this Court, which took place in the month (745) of November last, demands from us an expression of our views as to his character and a tribute of respect to his memory. He was a distinguished citizen of this State, and in his death this Court has sustained the loss of a learned, able and efficient member thereof. Possessed of a strong natural mind, well balanced, improved by culture and of untiring industry, energy and perseverance, characterized by a high standard of moral rectitude of deportment and fidelity to the interest committed to his charge, with a strong moral courage which prompted him never to shrink from the performance of any duty, his career in life was crowned with success. At the age of twenty-six he settled in this State, far away from his native place and kindred, without money and without friends. While qualifying himself for the practice of his profession, he earned his support by teaching a country school. After obtaining his license he engaged in his professional pursuit in competition with such eminent members of the bar as Ruffin, Murphy, Nash, Settle, Yancey, Shepherd and the Moreheads, and subsequently in the circuit to which he removed in competition with the Messrs. Burton, Caldwell, Alexander and Osborne, all of whom he survived; and being well grounded in the principles of the law, he always sustained himself and attained professional success. Distinguished as he was as a jurist, whose example as such for learning, industry and fidelity to the interest committed to his charge, is worthy of imitation by the junior members of the profession, he was likewise distinguished in the private walks of life. Possessed of a kind and tender heart, a sympathizing nature, he was always ready to aid the poor and distressed. As a husband and father he was kind and affectionate. To crown all, he was a Christian gentleman. Thus has our lamented friend "come to his grave in a full age like as a shock of corn cometh in his season." Notwithstanding this is true, still his death is an admonition to us all. "Be ye therefore ready also; for the Son of Man cometh at an hour when we think not."

Judge Boyden was born in Conway, Mass., 16 August, 1795, and was in the 78th year of his age at the time of his death. He was the son of John Boyden and Eunice (746) Hayden, his wife. He was a soldier in the war of 1812. He entered Williams College in 1817, where he spent his freshman year, having been prepared for college under the instruction of Dr. Edward Hitchcock of Deerfield Academy, in Massachusetts. He graduated at Union College, New York, in July, 1821. He commenced the study of the law while in college, and after his graduation prosecuted the study of law in the offices of Judah Yearby and Hon. Moses Hayden of New York. He came to North Carolina in 1822 and took up his abode in Guilford County. He obtained license to practice law in the courts of this State in December, 1823, and settled in Stokes County, near Germantown. He resided there until 1832, when he removed to Surry County. He represented that county in the House of Commons in 1838 and again in 1840. In 1842 he removed to Salisbury, where he continued to reside until his death. He represented Rowan County in the State Senate in 1844 and in 1847 was elected a member of the 30th Congress. At the expiration of his term he declined a re-election. From that time until he was raised to the bench he was actively engaged in the practice of his profession, having a circuit of twelve counties. He regularly attended this Court for more than thirty years. In 1865 he was elected a member of the State Convention. In 1868 he was elected a member of the 40th Congress, and in 1871 was appointed a Judge of this Court, which elevated position he held at the time of his death. During his residence in Stokes County he married Ruth, daughter of Hugh Martin, Esq., by whom he had several children. She died in 1844, and in December, 1845, he married Mrs. Jane C. Mitchell, daughter of the late Archibald Henderson, one of the most distinguished lawyers the State has ever produced. By his second wife he had one son, who survives him. In 1851 he connected himself with St. Luke's Episcopal Church, in Salisbury, and continued his connection therewith until his death. In the summer of 1873 he attended the annual commencement at Union College, his *alma mater,* being the 52d from the time of his graduation, and met there but one person who was a member of the institution at the same time with himself.

As a tribute of respect to our deceased friend,

Be it resolved, 1. That a copy of the proceedings (747) of this meeting be sent to the family of the deceased by the chair.

2. That a copy of the proceedings be presented to the Supreme Court and also to the Superior Court for the county of Rowan, with a request that they be spread on the minutes of said courts.

The above were unanimously adopted by the meeting. In presenting the resolutions, Mr. Wilson delivered a fervent and eloquent eulogium upon the character of Judge Boyden, whom he said he had known for more than thirty years. He spoke of his great ability, his indomitable energy and perseverance, which had enabled him to achieve such signal success at the bar; of his wonderful memory, which could retain the evidence in the largest and most complicated causes without ever taking a note; of his virtues, public and private, which he commended to the imitation of the younger members of the profession. Mr. Wilson was followed by T. J. Wilson, Esq., who had practiced with Judge Boyden for more than twenty years; by W. H. Bailey, Esq., who had been his law partner, and by Judge Cloud, who had been his law student and lived in his family. All these gentlemen paid eloquent and feeling tributes to the memory of the deceased, expressed their admiration for him as a man and a lawyer, and their sense of the great loss the profession and the State has sustained by his death.

On motion of Hon. W. H. Battle, it was ordered that a copy of the proceedings of this meeting be presented to the Supreme Court by the Attorney-General, with a request that they be spread upon the minutes of the Court; that a copy be forwarded to the Superior Court of Rowan, the county of the late residence of Judge Boyden, with a like request, and that a copy be sent to the widow and family of the deceased.

On motion, the meeting adjourned.

R. M. PEARSON, *Chairman.*

R. F. ARMFIELD, *Secretary.*

(748) SUPREME COURT ROOM,
29 January, 1874.

On the opening of the Court, Attorney-General Hargrove arose and said:

May it please your Honors:

On yesterday a meeting of the Bench and Bar of North Carolina, now in the city of Raleigh, adopted resolutions respecting the memory of the Hon. Nathaniel Boyden, deceased, late an Associate Justice of this Court. It was devolved upon me to present the resolutions of the meeting to your Honors and request that they be spread upon your minutes.

My acquaintance with Justice Boyden began when I was a student at Rockford, in the county of Surry, attending the law lectures of the present Chief Justice. The deceased was then in the full tide of practice and one of the most accomplished and successful advocates in North Carolina.

I well remember with what intense interest I at that period listened to his eloquent and effective efforts for his clients before the Court and jury (in the old court-house of Surry), and observed and wondered at his skill in the argument and conduct of his causes. He was, indeed, a faithful advocate, a distinguished jurist, a lover of his country and government, and, better than all, a Christian gentleman. But he who was so lately amongst us in all that remarkable buoyancy of spirits and mental activity with which he was blessed, and who was worthily enjoying the honors of a place on the highest judicial bench in this State, like his illustrious and learned predecessors who in times past have filled the same position, he, too, has gone.

The memory of his virtues remains with us and may well serve to incite others to follow in the paths of professional usefulness and integrity. I concur most heartily in the sentiments herein expressed. And now, in behalf of the meeting of the legal profession, I move your Honors that these resolutions be entered upon the records of this Court, and that the Court do now adjourn in respect to the memory of the Hon. Nathaniel Boyden, deceased.

To the remarks of the Attorney-General, *Chief* (749) *Justice Pearson* replied as follows:

The members of the Court concur in the resolutions adopted at the meeting of the profession. The Court will order the proceedings to be spread on the record.

Nathaniel Boyden was no ordinary man; he came upon the bench at an advanced age, but his quickness of perception, retentive memory and astonishing energy (he was never idle for a moment) had enabled him during his long attendance at the bar to acquire a great store of practical knowledge of his profession, and he was a very able and efficient member of this Court.

We regret his loss, both as an Associate Justice and as a friend. We will cherish his memory as one whom we admired for his talents and loved for his manly virtues.

The Court will stand adjourned until to-morrow at 10 o'clock A. M.

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ABATEMENT.

1. A suit that has abated by the death of the principal in a sheriff's bond cannot be revived against the sureties when the original summons was never served on the sureties. *Erwin v. Lawrence*, 282.
2. Under C. C. P., sec. 64, subsecs. 3 and 4, an action does not abate by the death of the plaintiff unless so adjudged by the Court. That section invests the presiding Judge with plenary powers in the premises, which is not the subject of revision by this Court unless there appears an abuse of those powers. *Baggarly v. Calvert*, 688.

See "Ejectment," 1.

ACCEPTANCE.

See "Bills, Bonds, etc.," 11, 16.

ACCOUNT.

See "Pleadings," 2, 3.

ACTIONS, CIVIL.

1. A complaint seeking to charge the lessee of the North Carolina Railroad with damages for refusing to transport the complainant, to whom the lessor of said road had issued a free pass for life, not alleging any obligation on the part of the lessee by contract or otherwise to carry the complainant over the road free: *Held* to be bad on demurrer, and that the Judge below was right in dismissing it. *Turner v. Railroad*, 1.
2. The free pass given by the lessor, the North Carolina Railroad Company, was only a license, without any consideration in law, which that company could revoke at pleasure, and did revoke by leasing the road to the defendant. *Ibid.*
3. The North Carolina Railroad Company, as well by its charter (Act of 1848 and 1849, chap. 82, and the supplemental acts thereto) as upon general principles, has the power to deposit or loan its surplus funds, and of course may bring the necessary actions to recover the sums loaned. *Railroad v. Moore*, 6.
4. When the question of the right or title to an office is put in issue, *mandamus* is not the form of action, the appropriate remedy being an action in the nature of a *quo warranto;* nor will *mandamus* lie when two persons claim the duty adversely to each other against a third party. *Brown v. Turner*, 93.
5. Any person having a right to office can, in his own name, bring an action for the purpose of testing his right against one claiming adversely. *Ibid.*
6. A person who is rightfully entitled to an office, although not in the actual possession thereof, has a property therein and may maintain an action for money had and received against a mere intruder who may perform the duties of such office for a time and receive the fees arising therefrom; and such intruder can-

ACTIONS, CIVIL—*Continued.*

not retain any part of the fees as a compensation for his labor. *Howerton v. Tate,* 161.

7. The right of action accruing upon the following instrument—"This is to show that half the hire of Randall, hired to Larkin Brooks, is Moses Jones'; December 29, 1853"—did not arise until a demand and refusal, at which time the statute of limitations began to run. *Jones v. Woods,* 447.

8. An action for deceit in the sale of a mule—an action *ex delicto* under the old system—is not within the jurisdiction of a justice of the peace, as provided in Art. IV, sec. 33, of the Constitution. *Bullinger v. Marshall,* 520.

9. Action against a board of county commissioners must be brought to the Superior Court of the county wherein those commissioners reside. *Comrs. v. Comrs.,* 657.

See "Contract," 7, 8.

ACTION, CRIMINAL.

See "Indictment," 2, 3, 5.

ACTION, EX DELICTO.

See "Action, Civil," 8.

ADVANCEMENT.

"See Descents," 2.

ADMINISTRATOR DE BONIS NON.

See "Executors and Administrators," 3, 4.
"Sale of Land for Assets," 2.

AGENT.

See "Evidence," 2, 11, 12.
"Executors," etc.

AGREEMENT.

1. If a plaintiff has, by his promise to compromise and take less than the whole of his demand, induced any other creditor to accept a composition and discharge the defendant from further liability, he cannot afterwards enforce his claim, since it would be a fraud upon that creditor. *Hayes v. Davidson,* 573.

2. An agreement to accept a less sum does not bar a demand for a greater when there is no other consideration. *Ibid.*

3. In 1861, A, the heir at law of B, administered on his estate; in 1862, less than two years, A, as heir at law, agrees to sell certain lands belonging to the estate of B to C, receiving at the time the full value for it, but executed no deed for said land until the year 1864. In an action to sell this land for assets to pay B's debts: *It was held,* that, although the agreement to sell in 1862 might have been defeated by B's creditors, the deed to C from A in 1864 for the same land was valid. *Donoho v. Patterson,* 649.

4. *Held further,* that the act restraining the heir from selling the land of his ancestor within two years (Rev. Code, chap. 46, sec. 61) is not a statute of limitation which was suspended by the Act

AGREEMENT—*Continued.*

of 1861, chap. 4, nor is it affected by the Act of 1863, chap. 43, which provides that in computations of time for the purpose of applying any statute limiting any action or suit, or any right or rights, or for the purpose of raising a presumption, etc., the time elapsed since the 20th of May, which was in the year 1861, or which may elapse until the end of the war, shall be excluded from the computation. *Ibid.*

See "Payment," 1.

AMENDMENT.

See "Pleading," 4, 5.
"Practice," 22.
"Practice, Criminal," 4.

APPEAL.

In an appeal to this Court it is the duty of the appellant to cause to be prepared a concise statement of the case, embodying the instructions of the Judge as signed by him, if there be any exceptions thereto, and the requests of the counsel for instructions, if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. The appellant cannot except to the charge of the Judge on the trial below for the first time in this Court. *Sampson v. Railroad,* 404.

See "Claim and Delivery of Personal Property," 2.
"New Trial," 5.
"Probate Court," 2.

ARBITRATION AND AWARD.

1. An agreement that an award shall be a rule of Court is merely an agreement to confess judgment according to the award when it shall be made. If the parties referring their matters in controversy have no suit in Court, the Court will not compel a performance of their agreement by attachment, as it will if the subject-matter has been brought in Court or otherwise. *Lusk v. Clayton,* 184.
2. The effect of a reference to arbitrators is very different from that of a reference under The Code. Arbitrators may choose an umpire; they are not bound to find the facts separately from their conclusions of law, and their award may be general, thus, "that plaintiff recover $.... and costs." *Ibid.*

ARREST OF JUDGMENT.

See "Practice, Criminal," 1.

ASSAULT AND BATTERY.

See "Justices of the Peace," 3.

ASSIGNEES.

See "Bills, Bonds, etc.," 5, 6.
"Contract," 4, 5.
"Bond to Make Title," 1.
"Easements," 4.

INDEX.

ATTACHMENT.

Where judgment has been obtained in an attachment against a company upon a fraudulent demand, sued by a wrong name, and having no notice of the action, such judgment should be set aside and the company allowed to plead, although the same was known by one name as well as another. *Copper Co. v. Martin*, 300.

See "Arbitration and Award," 1.
"Supreme Court," 2.

BANKS.

See "Contract," 4.

BASTARDS.

See "Wills," 4.

BILLS, BONDS AND PROMISSORY NOTES.

1. The value of a promissory note, dated March, 1863, payable on demand, is the sum due upon applying the legislative scale at the time the note was made, and not when payment was demanded. *Stokes (Neale) v. Cowles*, 124.
2. If a statute declares a security void, it is void in whosesoever hands it may come. If, however, a negotiable security be founded on an illegal consideration (and it is immaterial whether it be illegal at common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder, or of one claiming through such holder. *Glenn v. Bank.*
3. Bonds issued and signed by the last chairman of the County Court after the adoption of the present Constitution abolishing that Court, in payment of the county's subscription to the capital stock of a railroad company made by a former chairman according to law, which bonds were countersigned by the Clerk of that Court and sealed with the county seal and accepted by the president of the road in payment of the county subscription. are proper subjects of ratification, and when such bonds are ratified they are valid. *Alexander v. Comrs.*, 208.
4. When it is omitted in the act authorizing a county to issue bonds to pay its subscription to a railroad—by whom the bonds are to be signed and issued—a succeeding Legislature has the power to amend the act in this particular, *nunc pro tunc*, and thus render valid the action of those who issued the bonds without express authority. *Ibid.*
5. The assignee of non-negotiable or dishonored notes (such as bank bills protested for non-payment) takes them subject to all equities against his assignor, whether he knows of them or not. *Burroughs v. Bank*, 283.
6. A makes his note to B on the 7th of June, 1857, and on the 12th of August, 1860, C endorses on the back, "Pay the within to D," signing his name: *Held*, that C was not liable either as an endorser or guarantor, and that his indorsement merely passed the property in the note to D. *Crawford v. Lytle*, 385.
7. Bonds given for the loan of money to A B, to be used in purchasing a forge, at which iron was to be made for the Confederate

BILLS, BONDS AND PROMISSORY NOTES—*Continued.*

government, of which fact A B was duly informed, cannot be recovered. *Logan v. Plummer*, 388.

8. The principle established in such cases is, that whenever a dollar has been expended to destroy the life of the Republic, it shall never return to the pocket of the owner. *Ibid.*

9. A sues B on a note, which he swears he obtained from C under the following circumstances: C hands the note to A, telling him to collect it if possible, and from the proceeds pay himself $800, being the amount of a note held by A against C, and pay over the balance to him, C: *Held*, that the charge of his Honor below, that if they believed the above statement of A, the plaintiff, he had such an interest in the note as entitled him to recover, was right, and the defendant was not entitled to a new trial. *Willey v. Gatling*, 410.

10. *Held further*, that the charge of his Honor, on the issue as to whether the note had been paid, that if they believed the defendant, they should find the note paid; but if they believed the plaintiff, they should find the note had not been paid, was unsatisfactory and improper, on account of which the defendant is entitled to a new trial. *Ibid.*

11. When a defendant offers to pay a draft within fifteen days, presented to him by an agent, who communicates the offer to the holder of the draft, and is instructed by him to grant the indulgence, which instruction is told the defendant: *Held*, that the offer was a continuing one, and that his conditional acceptance bound the defendant as if it had been done when first presented. *Wylie v. Bryce*, 422.

12. Mere inadequacy of consideration, without fraud or imposition, is no defense to a suit on a bond; nor is it an objection, even when equity is invoked to enforce specific performance; and much less is it an objection when it is invoked to relieve against a contract. *Winslow v. Wood*, 430.

13. Where A sold a mule to B, which had a latent disease of which it died within a week after sale without rendering any service of value: *Held*, in a suit against B, on the bond given for the mule, that the failure of consideration was no defense, and that A was entitled to recover. *Ibid.*

14. The value of a note, payable on the 1st day of January, 1866, in Confederate money, given for the hire of slaves for the year 1865, is the value of such hire for the term of hiring, although the slaves were emancipated during the time. Such contract bears interest from the 1st day of January, 1866. *Dowd v. R. R.*, 468.

15. A bond signed by the defendant before the name of the obligee or the amount thereof is inserted, is not the deed of the defendant and cannot be recovered, although several payments have been been made thereon. *Barden v. Southerland*, 528.

16. The makers of a promissory note, being indebted to A, made it payable and delivered it to B and C, administrators, for the purpose that the amount of the note might be credited on a claim due their intestate from A: *Held*, that the acceptance of the note by B and C, although they refused to credit A with the amount enured to his, A's benefit, and that he had a right to hold the makers responsible for the amount. *Overman v. Grier*, 693.

BILLS, BONDS AND PROMISSORY NOTES—*Continued.*

17. A bond payable "with interest from date, the interest to be paid annually," is due and payable from date, and does not require a demand upon the obligors for payment before suit is brought. *Knight v. Braswell*, 709.

18. A bond for the payment of money executed in May, 1860, by the principal and his sureties, is by the 16th section of the C. C. P. exempted from the operation of the statute of limitations, as contained in sections 31 and 34 of the C. C. P. *Ibid.*

19. Where a bond is made payable "with interest from date, the interest to be paid annually," the interest becoming due at the end of each year is not barred by any statute of limitation that does not bar a suit on the bond itself. *Ibid.*

See "Covenant."
"Surety," 1, 2.
"Tender," 1, 2.

BOND.

See "Abatement," 1.

BOND TO MAKE TITLE.

1. A penal bond, conditioned to make title to land when the purchase-money is paid, may be assigned, and an action for damages for the non-performance of the condition, brought by the real party in interest. *Utley v. Foy*, 303.

2. In such suit, a note given to one of the parties to induce her to perfect the title by submitting to a private examination, is not a set-off or counter-claim. *Ibid.*

See "Contract," 2.
"Executors and Administrators," 5.

BOUNDARY.

See "Judge's Charge," 3.

CASE FOR SUPREME COURT.

See Appeal."
"Practice," 19.
"Probate Courts," 3.

CAVEAT EMPTOR.

See "Contract," 10, 11.

CERTIORARI.

See "Practice, Civil," 8.

CHALLENGE.

See "Practice Criminal," 5, 7.

CHEATING BY FALSE TOKENS.

See "Indictment," 4.

CITIES AND TOWNS.

1. The Act of 1791, chap. 31, sec. 1, empowering the Commissioners of the City of New Bern to levy taxes, among other specific pur-

CITIES AND TOWNS—*Continued.*

poses, "for such other good purposes as the said Commissioners may judge necessary," and the act of the special session of 1866, chap. 4, sec. 3, empowering the Mayor and Council of said City "by all the needful ordinances, rules and regulations, to secure order, health and quiet within the same, and for one mile around," confer on the municipal authorities sufficient power to repair and build guard-houses or jails. *McLin v. New Bern*, 12.

2. The Board of Commissioners of the town of New Bern, under the act of their incorporation, and the acts amendatory thereof, have the power to build and repair a market-house. *Smith v. New Bern*, 74.

3. Where a debt against a municipal corporation has been reduced to judgment in a court of competent jurisdiction, a peremptory *mandamus* may be properly asked for, although such judgment is dormant. *Webb v. Beaufort*, 307.

4. The commissioners of a town, authorized to subscribe to the capital stock of a corporation, upon its being so voted by a "majority of the voters of said town qualified to vote for commissioners," are justified in subscribing the amount voted, if a majority of the votes cast at the election, held for that purpose be in favor of such subscription, although a majority of *all* the voters of the town did not note. *Reiger v. Beaufort*, 319.

5. Although there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation, and although the clause to that effect in the Constitution of the United States, applies only to acts by the United States, and not to the governments of the States, yet the principle is so ground in natural equity, that it has never been denied to be a part of the law of North Carolina. *State v. Newsom*, 27 N. C., 50; *Davis v. R. R.*, 18 N. C., 451; *State v. Glenn*, 52 N. C., 321; *Cornelius v. Glenn*, *Ib.*, 512; *Johnson v. Rankin*, 550.

6. The Act of 1863, Private Acts, chap. 47, authorizing the Commissioners of the town of Asheville to extend the streets, etc., is not unconstitutional because of the manner therein prescribed, providing compensation to the owners of the land taken or injured by extending such streets. *Ibid.*

7. A plaintiff, whose land has been taken by the commissioners of a town for public use, waives all irregularities in the proceedings condemning such land, when he appeals from the assessment of damages by the persons appointed to assess them. *Ibid.*

8. Such appeal from the assessment of damages carries up no other question than the amount of the compensation which the plaintiff may be entitled to; and the commissioners are not guilty of a trespass in proceeding with their improvements pending the appeal. *Ibid.*

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. In action for the possession of personal property, under sec. 176, C. C. P., a third party claiming such property, loses his right to be made a party to the suit after a lapse of three years from the filing his affidavit and his motion to allow him to interplead. *Clemmons v. Hampton*, 934.

CLAIM AND DELIVERY OF PERSONAL PROPERTY—*Continued.*

2. Whether such claimant can appeal from an order of the presiding Judge, refusing his application to be made a party—Quere. *Ibid.*

See "Damages," 4.

CLERKS AND MASTERS.

In August, 1862, Confederate notes constituted the currency of the country; and a Clerk and Master, acting under an order of the Court to collect, is protected in receiving such money in payment of notes given for the purchase of land; and although he had no authority to invest the money and would have been liable for any loss arising from such investment, still, having invested the same in good faith in Confederate bonds, equally as good as the currency, itself, he cannot be neld responsible for their loss, occurring by the results of the war. *Mabry v. Engelhard,* 377.

See "Official Bonds."

CLERK SUPERIOR SOURT.

See "Executors and Administrators," 10.
"Witnesses," 1.

COMMISSIONER.

See "Practice Civil," 12.

COMMISSIONS.

See Sheriff," 1.

COMPLAINT.

See "Injunction," 1.

CONFEDERATE BONDS, MONEY, ETC.

See "Bills, Bonds, etc.," 14.
"Clerk and Master."
"Executors and Administrators," 2, 6.
"Guardian and Ward," 1, 5, 5.
"Tender," 1, 2, 3, 4.

CONFESSIONS.

See "Evidence," 9.

CONSIDERATION.

"Illegal." See "Bills, Bonds, etc," 2.
"Inadequate." See "Bills, Bonds, etc.," 12.
"Failure of," "Bills, Bonds, etc.," 13.
See "Contract," 9.

CONTRACT.

1. A and B in January, 1872, entered into a verbal agreement that B should cultivate A's farm that year, A furnishing the teams and G labor; A was also to advance money during the year to pay the laborers, which advances were to be a lien on B's share of the crop, and when the crop was gathered, A was to have

CONTRACT—*Continued.*

two-thirds thereof and B one-third. In September, B assigned to C, the plaintiff, his interest in the crop, to secure a debt, and during the same month died; A administered on B's estate, and filed a lien on his part of the crop to secure the amounts he had advanced for labor, and for gathering the crop after B's death: *Held*, that A, the defendant, was entitled to be paid the money advanced for housing the crop; and that for the amount paid to the laborers, he was subrogated to their right of an inchoate lien on the crop in preference to the claim of the plaintiff. *McCoy v. Wood*, 121.

2. A sells a tract of land to B, retaining the title until the purchase-money is paid. B makes a payment on the debt due A, and then sells his interest to C; A and B agree to obtain from the proper Court a decree of sale, which is made, the land sold and is purchased by C, (the title still being retained until the purchase-money is paid) who gives his bonds to A and B for their respective shares. C being unable to pay his bonds, A brings this action against the other parties, asking for a sale of the land, and the proper distribution of the purchase-money; the land is sold and A becomes the purchaser, B claiming a *pro rata* share of the proceeds of sale: *Held*, that B until he paid the debt to A for the first purchase, was entitled to no part of the proceeds of sale; and further, that if the land sold for more than B owed A, B was entitled to the surplus and the surrender of his note; if it sold for less, B's note must be credited with the amount it did sell for. *Elliott v. Robards*, 181.

3. When a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast on the purchaser all future risk, if nothing remains to be done to the goods, although such purchaser cannot take them away without paying the price. *Therefore*, a levy of an execution on a horse which had been sold but not delivered, as the property of the purchaser of such horse, was valid. *Jenkins v. Jarrett*, 255.

4. In a suit between two banks for the recovery of $19,331, it is agreed by the debtor bank to pay one-half of said debt and interest in cash, and to satisfy, pay and discharge the balance by paying over to the other 50 *per cent.* of its assets as they are collected, and as may be sufficient therefor, the creditor bank agreeing to accept such payment and agreement as to the remainder, in "full satisfaction, payment and discharge of the suit and of all matters controverted therein or appurtenant": *Held*, that this agreement was in effect an assignment of one-half the assets of the debtor bank, as a security for its remaining indebtedness. *Perry v. Bank*, 309.

5. *Held further*, That such assignment not being registered, was void against a creditor of the bank making the assignment; and that the creditor acquired a lien on the choses in action assigned, as soon as the Court below condemns them to his use. *Ibid.*

6. In an action to recover the stipulated price of certain castings, the defendant can show that the castings were not such as he contracted for, and were not suited to the purposes for which they were designed; and the jury, in their verdict, can allow

CONTRACT—*Continued.*

the defendant the difference of value between the castings delivered and those contracted for. *Howie v. Rea*, 559.

7. In such case the defendant, by receiving the castings, so that he cannot return them, does not abandon his right either to sue for a breach of contract, or to insist, in his defense, on a reduction of the price agreed to be paid. *Ibid.*

8. Any third person, who without lawful justification, induces a party who, for a consideration, has contracted to render personal service to another, to quit such service and refuse to perform his part of the agreement, is liable to the party injured in damages. *Haskins v. Royster*, 601.

9. That the consideration of a contract is too small, or its terms unreasonable, will not justify a Court, for the benefit of a third person not a party thereto, in setting such contract aside; nor is the fact that one of the contracting parties is appointed to decide as to the performance or non-performance of certain conditions, a sufficient cause for annulling and setting aside the same. *Ibid.*

10. In contracts for the sale of land, it is the duty of the purchaser to guard himself against defect of title, quantity, incumbrance and the like; if he fails to do so it is his own folly, for the law will not afford him a remedy for the consequence of his own negligence. *Etheridge v. Vernoy*, 713.

11. If, however, representations are made by the bargainor, which may be reasonably relied upon by the purchaser, and they constitute material inducement to the contract, and are false within the knowledge of the party making them, and they cause damage and loss to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief. *Ibid.*

See "Actions Civil," 1.

COUNSEL.

See "Practice Criminal," 3.
"Witnesses," 2, 3.

COUNTER CLAIM.

A claim for services alleged to be illegal, when once adjusted and allowed by the parties in a settlement, cannot be set aside for its alleged illegality, when presented by defendant as a set-off to the demand of the plaintiff's assignee. *Lusk v. Patton*, 701.

See "Bond to make title," 2.

COUNTIES.

Where a plaintiff holds a debt against a county, contracted since the adoption of the Constitution, for the ordinary and necessary expenses of the county, and where the county has the means to pay the debt, such plaintiff is entitled to a peremptory *mandamus*, and it was error in the Court below to refuse it. *Uzzle v. Comrs.*, 564.

"Subscription by." See "Bills, Bonds, etc.," 3, 4.

COUNTY COURT.
See "Bills, Bonds, etc.," 3.
"County Commissioners," 1.

COUNTY COMMIISSIONERS.

1. When a matter is voluntarily settled by the act of the parties, in the absence of fraud or mistake, it must be deemed settled forever. *Therefore,* where the County Court of a county, in the year 1862, appointed an agent to borrow money and purchase salt for the families of soldiers then in the Confederate army, and in 1867 ordered the agent to pay to the person from whom the money was borrowed a certain sum, which was done, the board of commissioners of such a county cannot recover back the money so paid by the agent. *Comrs. v. Setzer,* 426.
2. In an action against the board of commissioners of one county, brought to the Superior Court of an adjoining county, objection to the *venue* must be taken in that Court; otherwise the objection will be considered as waived. *Edwards v. Comrs.,* 571.
3. A creditor of a county cannot be compelled either by the Legislature or by the board of commissioners to "bond" his debt and wait five years for its ultimate satisfaction; such creditor is entitled to a peremptory *mandamus.* *Ibid.*
4. When a few of a class are permitted to sue for a whole class, and especially when permitted to sue for the public, they will not be allowed technical advantages which involve a breach of faith. *Street v. Comrs.,* 644.
5. *Therefore,* it is no good defense to a suit on the bonds issued to pay for stock subscribed for by a county in a certain railroad that the agent authorized to make such subscription, instead of subscribing for the stock himself, purchased the same from a third person. *Ibid.*
6. Nor is it a valid defense that the county issued its own bonds to pay such subscription instead of negotiating a loan, as empowered to do by the act. *Ibid.*
7. When, by the act authorizing a county to subscribe for stock in a railroad, it is provided that such county may "levy such taxes annually as may be sufficient to pay the amount of such loan and interest thereon," the board of commissioners of the county have the power to lay a tax of two dollars on every hundred dollars of property. *Ibid.*
8. Equity will enjoin no one to make an iniquitous defense: *Therefore,* a board of county commissioners are not compelled to plead the statute of limitations, even when such plea would be a valid defense. *Ibid.*

See "Actions, Civil," 9.
"Taxes," 2, 3.

COURTS OF EQUITY.
See "Jurisdiction," 1.
"Practice," 13.

COVENANT.
A enters into a covenant to purchase of B certain lands at the price of $2,500, to be paid by the surrender to B of a note held by A against him for $1,700, payable in specie or its equivalent, and

COVENANT—*Continued.*

A promising to pay (or secure) the balance of the purchase-money for the land to C: *Held*, that A was not entitled to any premium on the note for $1,700 agreed to be surrendered, as by the agreement to surrender, the value of that note as well as the price of the land was determined by the parties. *Jarratt v. Wilson*, 401.

See "Easement," 3.

CREDITORS.

See "Agreement," 3.

CREDITOR'S BILL.

See "Executors and Administrators," 15, 16.

CROP.

See "Contract," 1.

DAMAGES.

1. In a suit for damages for an injury to plaintiff's land by ponding water upon it, the defense relied on being an easement by prescription to pond water back by the erection of a new dam in place of an old one, and the plaintiff replying to such defense that the new dam was higher and tighter than the old one, and that thus the easement was exceeded: *Held*, that the issue submitted to the jury as to the height of the new dam, and as to whether from such height over the height of the old dam the plaintiff was endamaged, are not sufficiently responsive to the allegation and denial in complaint and answer, and that the jury should find whether or not the defendant has exceeded his easement and ponded water back further than he had a right to do by prescription. *Jenkins v. Conley*, 353.
2. Plaintiff, going to defendant's warehouse after goods, stops his wagon on a track nearest the platform and next to the main track over which the mail train passes, so near thereto as to be in the way of the engine: *Held*, in a suit to recover damages for the destruction of his wagon by the engine, that his loss is the result of his own negligence, and that he had no right to recover. *Murphy v. Railroad*, 437.
3. The value of property taken under process should be assessed at the time of trial, as the taker should have the option of returning the property so taken or of paying its assessed value. If the price of the property taken has fallen in the time, the jury should include the difference in their assessment of damages for the detention. *Insurance Co. v. Davis*, 485.

See "Cities and Towns," 78.
"Contract," 6.
"Officers," 1, 2.
"Practice, Civil," 21.

DECEIT.

See "Actions, Civil," 8.

DECLARATIONS.

See "Evidence," 2, 5, 10, 14.

DEEDS.

1. To take the acknowledgment and private examination of a *feme covert* to a deed conveying her land is a judicial act, and, when duly taken, the deed so acknowledged is an assurance of record, like a *fine* in England. *Paul v. Carpenter,* 502.

2. An acknowledgment and private examination taken by the Provost Marshal of the city of New Bern, while that place was in possession of the United States military authorities, in the absence of fraud and the like, is good, having a similar effect with foreign judgments. *Ibid.*

See "Judge's Charge," 3.
"Pleading," 6.

DEED IN TRUST.

Since the statute of 1829, deeds in trust and mortgages are of no validity whatever as against purchasers for value and creditors until they are registered, and they take effect only from and after registration. No notice, however full and formal, will supply the place of registration. *Robinson v. Willoughby*, 359.

DEMAND.

See "Actions, Civil," 7.

DEMURRER.

See "Actions, Civil," 1.

DESCENTS.

1. A died seized and possessed of real and personal estate, leaving him surviving three grandchildren by a son and five by a daughter, the son and daughter having died before A: *Held*, that under Rule 3, Bat. Rev., chap. 36, the grandchildren represent their ancestors and take the estate *per stirpes* and not *per capita*. *Crump v. Faucett*, 345.

2. And, as the parties take by representation, it follows that any advancements made to the ancestors must be accounted for. *Ibid.*

DILIGENCE.

See "Executors and Administrators," 1, 2.
"Guardian and Ward," 3.

DISTRIBUTEES AND DISTRIBUTION.

See "Executors," etc., 13, 14.
"Descents," 1.
"Probate Courts," 4.

DOWER.

See "Sale of Lands for Assets," 1.

DRAINING WET LANDS.

See "Easements," 1, 2.

EASEMENTS.

1. When, upon the petition of one or more parties, under the Act of 1795 (Rev. Stat., chap. 40), leave was granted by the County

EASEMENTS—*Continued.*

Court to cut a canal across the land of another for the purposes of drainage, the petitioners and their assignees, upon the report of the jury provided for in said act being confirmed, acquire not merely an easement, but title in fee to the land condemned. *Norfleet v. Cromwell*, 634.

2. The right of the State to condemn land for drains rests on the same foundation as its right in cases of public roads, mills, railroads, school-houses, etc. The acts granting such powers are not unconstitutional. *Ibid.*
3. Where a covenant is not to be performed on the land, but concerns it, the covenant will be enforced against an assignee of the covenantor with notice. *Ibid.*
4. If the party from whom an assignee purchases cannot complain of an alleged misuser of an easement, the assignee cannot, as he stands in the shoes of him from whom he purchased. *Ibid.*

See "Damages," 1.

EJECTMENT.

1. An action of ejectment does not abate by the death of the lessor of the plaintiff, and there is no necessity to make the heirs of the lessor parties to the suit, except to make such heirs liable for costs, the supposed lease being in no way affected by the lessor's death. *McLennan v. McLeod*, 364.
2. In an old action of ejectment the fiction of a "lease, entry and ouster" was adopted merely for the sake of saving the trouble and expense of making a lease and entry; therefore no lease can be set out in the declaration, which could not have been made at the time the action was commenced. *Ibid.*

ELECTION.

See "Payment," 2, 3.

EQUATION OF TAXATION.

See "Taxes," 2, 3.

ERROR.

See "Practice," 14.

ESCHEAT.

See "Wills," 4.

ESTOPPEL.

See "Agreement," 2.
"Sheriff's Sale," 3.

EVIDENCE.

1. In an action brought to subject certain lands (purchased by defendant) to the operation of an alleged verbal trust, to set up which it is material that all of certain parties contributed to the payment of the debt charged upon the land, evidence tending to show that one of such parties paid nothing towards said debt and claimed no interest in the land is material and admissible, and that his Honor erred in excluding it on the trial below. *Taylor v. Dudley*, 146.

EVIDENCE—*Continued.*

2. What an agent says or does within the scope of his agency and while engaged in the very business is evidence for or against his principal. His declarations made subsequently as to what he had done is not evidence, though he may continue still to act as agent generally or in other matters. *McComb v. Railroad,* 178.

3. The rule that when two witnesses of equal credibility swear affirmatively and negatively as to a certain issue, credit is given to the affirmative statement in preference to the negative, is not a rule of law to be laid down by the Court, and it was no error in the Judge to refuse so to charge. *Glenn v. Bank,* 191.

4. When a party to a suit who is *in interest* really a plaintiff, but appears as a party defendant, gives evidence as to a transaction with a deceased testator, it renders competent the evidence of a co-defendant touching the same transaction, as provided for by section 343, C. C. P. *Redman v. Redman,* 257.

5. If the declaration of a testator made in his life-time, not in the presence of the defendant, could not be given in evidence because of his not being permitted to make evidence for himself, his administrator will not be allowed to prove such declarations after his death. *Ibid.*

6. The entries on the record that certain exceptions were to be "passed upon by the Court as of this term," followed by the judgment of the Court, are conclusive of the waiver of a jury trial by the parties and cannot be impeached. *Maxwell v. Maxwell,* 267.

7. A plaintiff, being examined in his own behalf and swearing that the defendant promised to pay a certain debt, the defendant swearing that he made no such promise, both witnesses being of equal credibility, is not entitled to have the jury charged by the Court that as a rule of evidence the positive testimony was entitled to *more* weight than the negative testimony. *Smith v. McIlwaine,* 287.

8. Such rule is subject to so many exceptions as not to be of much practical use, and, if carelessly administered, may work much mischief. *Ibid.*

9. The prosecutor, a white man, the employer of the defendant, a colored man, goes to the field where the defendant is at work, with two other white men, and tells him that he has lost a hog, at the time saying "I believe you are guilty; if you are, you had better say so; if you are not, you had better say that," and the defendant confesses his guilt: *Held,* that the confession was made under the influence of hope or fear, or both, and under the circumstances was inadmissible. *State v. Whitfield,* 356.

10. The acts and declarations of a vendor while in possession of the property sold are competent both to prove the fact of possession and control and to qualify the extent and purpose of the possession. *Kirby v. Masten,* 540.

11. Evidence of what an agent said in regard to a transaction already passed, but while his agency for similar objects still continued,

EVIDENCE—*Continued.*

is not admissible to prove the contract itself, although it is competent to contradict the statement of the agent that no such contract was made. *Stenhouse v. Railroad*, 542.

12. If such evidence is, after objection, received generally, without confining it to the contradiction of the statement of the agent, it is error and entitles the party objecting to its reception to a new trial. *Ibid.*

13. The deed from a sheriff to the purchaser of land sold under a *ven. ex.* is evidence on a question of title, notwithstanding there is endorsed on such *ven. ex.* a memorandum that there was "no sale for want of compliance." *Maynard v. Moore*, 546.

14. A sues B for assisting C to remove from the State, alleging such removal to have been for the purpose of defrauding C's creditors, of whom A was one. The declaration of C, contained in a letter to A, is not evidence against B unless the complicity of B and C be established *aliunde*, and such declarations cannot be received to prove such complicity. *Bryce v. Butler*, 585.

15. Because the presiding Judge, after objection, permitted the plaintiff to read the body of a letter which was unimportant and irrelevant, is no reason that he should permit the reading of the postscript, which was relevant, upon the ground that when *part* of a declaration is received as evidence the party is entitled to have the *whole* thereof go to the jury. *Ibid.*

See "Executors and Administrators," 3.
"Guardian and Ward," 6, 7.
"Negligence," 1, 2.
"Payment," 1.
"Roads," 1.

EXCEPTIONS.

See "Appeal."
"Practice," 3, 4, 17.

EXECUTIONS.

1. Where an execution issued from the County Court in 1861 and regularly thereafter until the Spring Term, 1867, of the Superior Court, to which Court it was transferred under the ordinance of the 23d of June, 1866, but no motion made at said Spring Term, 1867, to docket in the Superior Court, and the same was not re-issued until December (Special) Term, 1867, such execution lost its lien on the land levied upon, and a sale of the land by virtue thereof conveyed no title. *Brem v. Jamieson*, 566.

2. Where the name of one or more of the defendants is omitted in an *alias* execution regularly issued before that time and levied on the land of such defendant, the omission is fatal, and a sale of the land under such execution is invalid. *Ibid.*

See "Contract," 3.
"Judgment."
"Sheriff," 1, 3.
"Sheriff's Sale," 1, 3, 4.
"Superior Courts."

INDEX.

EXECUTORS AND ADMINISTRATORS.

1. That a defendant, an administrator, did not attempt to collect a debt for more than eighteen months after it fell due does not warrant the legal inference of a want of due diligence on his part, without a finding of the further fact that the obligors were men in failing circumstances, so as to call for active diligence in the collection, or that the condition of the estate required immediate collection in order to pay off pressing demands and save costs. *Keener v. Finger*, 35.

2. Nor does it amount to a want of due diligence that the defendant caused a levy to be held up for three years after judgment, and then directed the execution to one of the defendants therein, which was not kept up and perfected as a lien, unless it is also found that it was for the interest of the trust fund that the debt should have been collected in 1863-'64, in Confederate money, or else that the circumstances were such that the defendant should have taken upon himself the odium of demanding specie, or that the defendant, in the exercise of due diligence, should have foreseen the fact that at the close of the war there was to be a military order forbidding the collection of old debts contracted for the purchase of slaves. *Ibid.*

3. A privity exists between an administrator *de bonis non* and the first administrator as well in the case of plaintiff as of defendant, so that the former succeeds to all the rights of the intestate in respect to personal property which the first had not fully administered; and a judgment against the first administrator is conclusive evidence against the administrator *de bonis non* in an action to renew it. *Thompson v. Badham*, 141.

4. Such judgment may, however, be impeached for fraud by the administrator *de bonis non*, either by motion in the cause or by answer to plaintiff's action to revive it. *Ibid.*

5. An intestate sells B a tract of land for $800, putting him in possession and giving him a bond to make title when the purchase-money is paid; B pays part and refuses to pay the balance of the purchase-money. A, the administrator, sues B, demanding, first, a rescission of the contract; second, a writ of possession; and third, damages: *Held*, that he is entitled to neither, but that he was entitled to a judgment for the unpaid balance and to a sale of the land if such judgment is not satisfied. *Mitchell v. Wood*, 297.

6. An executor had no right, in the fall of 1863, to collect good notes belonging to his testator's estate and invest the proceeds in Confederate bonds. *Bell v. King*, 330.

7. The irregularity of bringing a suit against an administrator for the settlement of his intestate's estate in the Superior Court at term time instead of in the Probate Court is cured by sections 425, 426, chap. 17, Bat. Rev. *Herring v. Outlaw*, 334.

8. In a suit to recover a distributive share in an intestate's estate it is not necessary to prove that the person paying such share to the agent of the distributee was at the time rightful administrator; and evidence to prove that such person paid the distributee's share to the agent is clearly admissible. *Neighbors v. Jordan*, 406.

9. It is against the policy of the law to allow an administrator to buy at his own sale; and when he does so, those interested have

EXECUTORS AND ADMINISTRATORS—*Continued.*

their election to treat the sale as a nullity and set it aside or to let the sale stand and demand a full price. *Froneberger v. Lewis*, 456.

10. Section 73, chap. 45, Bat. Rev., gives to Clerks of the Superior Courts jurisdiction of debts against the estate of deceased persons. *Jenkins v. Carter*, 500.

11. Docketed judgments in force against the estate of a decedent has priority of payment over other debts to the extent of the lien which such judgment has on the real estate. If the real estate is more than enough to pay the judgment, then the whole thereof has priority over other debts; if the real estate is only sufficient to pay part of the judgment, then the priority is measured by the value of such real estate. *Ibid.*

12. A surety to an administration bond who paid one-half of a debt recovered against the insolvent administrator is not subrogated to the rights of the *creditor* whose debt he paid, but to the rights of the *administrator* for whom he paid it. *Clarke v. Williams*, 679.

13. An administrator against whom a judgment was recovered after he had turned over the property of his intestate to the distributees has the right to recover from them each their ratable part of such debt when it appears that the intestate was only surety to the debt recovered, and that at the time he delivered the property to the distributees the principal in the debt was solvent and able to pay the same and was rendered insolvent by the manumission of his slaves. *Ibid.*

14. In such case the distributees will contribute each their ratable part and no more, the solvent ones not having to pay the parts of the insolvent. *Ibid.*

15. In a creditor's bill against an administrator, when it is found upon a reference to ascertain the debts that the fund is sufficient to pay such debts, a judgment against the administrator, on the admission of the debt, is taken as full proof, for the reason that the other creditors are not interested in the matter. *Overman v. Grier*, 693.

16. On the contrary, when the fund is not sufficient to pay the debts, each creditor is allowed to dispute the debt of any other, and the debt of such other creditor must be proved *de novo* before the referee; for in such case the creditors have a direct interest in the question, debt or no debt, inasmuch as its allowance will diminish the fund *pro tanto*. *Ibid.*

17. Where an executor is authorized to sell the lands of his testator in his discretion, this Court will not interfere by entertaining an application for a license to sell. Such an executor may be compelled to sell when third persons have a right to compel him to do so, and the Court will restrain abuse of his discretion. *Hinton v. Hinton*, 730.

See "Agreement," 3.
"Bills, Bonds, etc.," 16.
"Contract," 1.
"Practice, Civil," 16.
"Sale of Land for Assets," 1.
"Superior Courts," 2.

EXEMPTION.
See "Roads," 2.

FEES.
See "Actions, Civil," 6.
"Sheriff," 4.

FIXTURES.
When the owner of the inheritance attaches to the freehold articles of personalty for the better enjoyment of the estate, such articles become a part of the realty and pass to the heir, mortgagee or vendee. *Latham v. Blakely*, 368.

FORCIBLE ENTRY AND DETAINER.
See "Justices of the Peace," 1, 5.

FORCIBLE TRESPASS.
1. To constitute the offense of forcible trespass there must be a "demonstration of force," such as is calculated to intimidate or put in fear, the law not allowing its aid to be invoked by indictment for rudeness of language or even slight demonstration of force against which ordinary firmness will be sufficient protection. *State v. Covington*, 71.
2. An indictment under the Act of 1866, chap. 60, in which it is charged that the defendant did unlawfully enter upon the premises of the prosecutor, he, the said defendant, having been forbidden to enter on said premises and not having a license so to enter, etc., is sufficient. *State v. Whitehurst*, 85.

See "Justices of the Peace," 2.

FRAUDS.
See "Agreement," 1.
"Attachment."
"Executors and Administrators," 4.
"Notice."
"Sheriff's Sale."

GUARDIAN AND WARD.
1. Confederate money taken in good faith should be received at its scaled value in all fiduciary transactions: *Therefore*, a guardian who paid the taxes due from his ward's estate with his own Confederate money can only receive credit for the value thereof according to the legislative scale. *Cox v. Peebles*, 10.
2. Good faith requires that any profit which arises from a transaction of the guardian in the management of the ward's estate must be for the benefit of the ward and not of the guardian. *Ibid.*
3. A defendant, in the exercise of due diligence in collecting a bond due a ward, is not required to foresee the fact that under the construction given to the homestead law it would be held to apply to pre-existing debts, nor the fact that a levy before the adoption of the Constitution would hold good, notwithstanding the provisions of such law. *Wells v. Sluder*, 55.
4. A party who at first refuses to receive Confederate money in payment of a debt due a ward, is afterwards prevailed upon so

GUARDIAN AND WARD—*Continued.*

to do by the declarations of the obligor, yields to a groundless fear and is liable to the ward for the amount so received. *Ibid.*

5. A guardian who, in 1862, exchanged North Carolina six per cent. bonds for North Carolina eights, when his wards were of full age, and afterwards received the semi-annual interest on such bonds and gave the guardian their receipt for the same when the bonds were turned over to them, is not responsible for the same, though they were lost by the results of the war. *Pearson v. Caldwell*, 291.

6. In a suit on a guardian bond, evidence that the court-house of the county in which the bond was taken was burned, with many official papers, in 1862, and that search had been made among the papers of a deceased person who was Clerk at the time of burning and who was in the habit of keeping some of the official papers at his residence, and that no bond given by the guardian of the plaintiff had been found, was held sufficient to authorize the introduction of secondary evidence of the execution and contents of the bonds declared on. *Harrel v. Hare*, 658.

7. A certified copy of the extracts from the records of the County Court that at August Term, 1850, the guardian of the plaintiff and other minors renewed his bond by entering into another bond in the sum of $3,000 with the present defendant and another as his sureties, is competent evidence to prove the existence and due execution of the bond declared upon; and a certified copy of the guardian's return is also competent as tending to establish the amount due at the date of the return. *Ibid.*

8. An action against a guardian for an account and settlement with his ward should commence in the Probate Court. The mistake in the jurisdiction (as an irregularity) is cured either by waiver, as when defendant answers the complaint, or otherwise pleads to the merits, or by the merits, or by the operation of remedial statutes. *Clodfelter v. Bost*, 733.

9. When the defendant in 1854 took the guardianship of the plaintiff, who, as heir of a soldier killed in the Mexican war, was entitled to a pension from the United States Government, which facts within the knowledge of the guardian were sufficient to put him on inquiry as to such pension, and where the guardian had been remiss in other duties: *Held*, that he was responsible for such pension from 1854 until his ward became of age. *Ibid.*

HEIR AT LAW.

See "Agreement," 3, 4.
"Fixtures."
"Pleading," 6.

HUSBAND AND WIFE.

1. The doctrine of years ago, that a husband had the right to whip his wife, *provided* he used a switch no larger than his thumb, no longer governs the decisions of our Courts; and the opinion more in accordance with our present civilization, that a husband has no legal right to chastise his wife under any circumstances, prevails. *State v. Oliver*, 60.

2. To entitle a husband to an estate as tenant by the courtesy before the adoption of the Rev. Code (1st January, 1856), a seizin in

HUSBAND AND WIFE—*Continued.*

deed was necessary; and under the rules prescribed in chapter 38, Rev. Stat. (1 January, 1838) a seizin in deed was also necessary in case of the parent's claiming a life estate upon the death of his child. Now, under the provisions of the Rev. Code, chap. 38, rules 1 and 13, neither actual nor legal seizin is necessary to make the stock in the devolution of estates. *Sears v. McBride*, 152.

3. At common law, neither the husband nor the wife is allowed to prove the fact of access or non-access; and as such rule is founded "upon decency, morality and public policy," it is not changed by chapter 43, section 15, Bat. Rev. (C. C. P., sec. 340), allowing parties to testify in their own behalf. *Boykin v. Boykin*, 262.

4. Where there was an agreement between a husband and wife that if the wife would join him in a conveyance of a certain tract of land descended to the wife from her father she should have another tract in lieu of the one so conveyed: *Held*, that when the husband received the money for the land conveyed as before set out, he held it upon trust for his wife, and that his estate became responsible therefor. *Dula v. Young*, 450.

5. *Held further*, that the heirs at law of the wife are entitled to the land agreed to be substituted for that of the wife, free from the incumbrance of the husband's debts. *Ibid.*

INDICTMENT.

1. It is not necessary to constitute a riot that the facts charged should amount to a distinct and substantive indictable offense; it is sufficient if such facts shall constitute an attempt to commit an act of violence which, if completed, would be an indictable offense. *State v. York*, 66.

2. An indictment in which it is charged that the defendant "did profanely curse and swear and take the name of Almighty God in vain," etc., "to the common nuisance," etc., charges no offense and cannot be sustained. *State v. Powell*, 67.

3. In an indictment under the ninety-fifth section of chapter 32 of Bat. Rev., the charge that the defendants "unlawfully and wilfully did kill, injure and abuse one cow, one heifer, the property," etc., "which said cow and heifer were then and there in an enclosure not then and there surrounded by a lawful and sufficient fence," is sufficient. *State v. Painter*, 70.

4. The defendant sold to the prosecutor four barrels of crude turpentine, representing "that they were all right, just as good at bottom as they were at top," etc., and when examined the barrels contained only a small quantity of turpentine on the top of each, the rest of the contents being chips and dirt: *Held*, that the defendant was guilty of cheating by false tokens. *State v. Jones*, 75.

5. An indictment, to be good, must set forth with plainness and certainty all the essential facts constituting the offense; the charge must be explicit enough to support itself, for if all the facts alleged in the indictment may be true and yet constitute no offense, the indictment is insufficient. *State v. Eason*, 88.

6. To an indictment for injuring a public school-house the defendants for a defense set up a claim in a third person to the house

INDICTMENT—*Continued.*

alleged to be injured, and justified the permission of such claimant to commit the acts complained of: *Held,* that the charge of the Judge below, "If the jury believed the defendants honestly were of the belief that the house was the property of" such claimant, "and he had a right to give it to them, they were not guilty, but if the defendants did the acts complained of, willing to run the risk of a suit, or careless whether they had a right or not, that would not protect them, they would be guilty," was as favorable as the defendants could ask and was no good ground for a new trial. *State v. Roseman,* 235.

7. A defendant cannot be convicted of that which he is not charged. *Therefore,* where the Judge below, upon the trial of an indictment charging the defendant with breaking and entering into the house of the prosecutor and stealing therefrom, charged the jury "that if they believed the defendants (however they may have got into the house) broke out of it, they were guilty": *It was held* to be error and to entitle the new defendants to a new trial. *State v. McPherson,* 239.
8. In an indictment containing two counts—one for larceny and the other for receiving stolen goods—the jury may bring in a general verdict of guilty, the grade of punishment being the same for each offense. *State v. Baker,* 530.

See "Perjury."

INJURY TO A SCHOOL-HOUSE.

Se *supra,* 6.

INJUNCTION.

1. When the allegations in the complaint upon which it is sought to set up injunctive relief are fully met by the answer, the restraining order first issued will be set aside and an injunction until the hearing refused. *Woodfin v. Beach,* 455.
2. When the dissolution of an injunction would be equivalent to a dismissal of the action, if a reasonable doubt exists in the mind of the Court whether the equity of the complaint be sufficiently negatived by the answer the Court will not dissolve the injunction, but continue it to the hearing. *Lowe v. Comrs.,* 532.

INTEREST.

The rule for computing interest on a bond given in South Carolina is to calculate the interest upon the principal for the first year, setting the interest aside, and then for the second, third and so on until the time for the first payment; then calculate the interest on each year's interest to the same time, and apply the payment first to the extinguishment of this interest, and the surplus, if any, to a reduction of the principal. If the payment is not sufficient to pay this interest, first extinguish the interest calculated on each year's interest and apply the surplus to the principal interest as far as it will go. If the payment is not enough to satisfy the interest on the interest, it is set aside and neither stops nor bears interest. *Bratton v. Allison,* 498. (See Memoranda, 739).

See "Bills, Bonds," etc., 17, 19.
"Tender," 1, 2, 3, 4.

JUDGE OF THE SUPERIOR COURT.

See "Abatement," 2.
"Practice, Civil," 13, 20, 22.
"Practice, Criminal," 2, 3.

JUDGE'S CHARGE.

1. It is prejudicial to the rights of the plaintiffs for the presiding Judge on the trial below to charge the jury that "the plaintiffs are not entitled to recover in any event, and if the issues were found in their favor he would set aside the verdict," and afterwards to submit the issues to be passed upon by the jury to "say how the matter was." *Dula v. Young*, 450.
2. When, on the joint trial of two prisoners for murder, the presiding Judge directs the acquittal of one, remarking at the time, "I shall direct an acquittal as to him, although I think it not improbable that he was there," the other prisoner not being in any manner prejudiced by such remark, has no right to complain and is not entitled to a new trial. *State v. Martin*, 628.
3. What are the termini or boundary of a grant or deed is a matter of law; where these termini are is a matter of fact for the jury. Therefore, where there was evidence tending to establish a certain corner at a particular place, it was error in the presiding Judge to say, as a conclusion of law, the corner was at a different place. *Clark v. Wagoner*, 706.

See "Bills, Bonds, etc.," 9, 10.
"Damages," 1.
"Evidence," 1, 15.
"Indictment," 6, 7.
"Larceny," 1.
"New Trial."
"Practice," 15.

JUDGMENT.

The lien on land acquired by a docketed judgment shall not be lost in favor of a judgment subsequently docketed, unless the plaintiff in the latter take out execution and give the plaintiff in the former twenty days' notice before the day of sale by the sheriff, and the plaintiff so notified shall fail to take out execution and put it into the sheriff's hands before the day of sale. Rule 19, 63 N. C. Rep. 669. *Dougherty v. Logan*, 558.

See "Executors and Administrators," 3, 4, 5, 11, 13, 15.

JURISDICTION.

1. The jurisdiction conferred on our former Courts of Equity by the ordinance of the 23d of June, 1866, in favor of creditors following assets into the hands of fraudulent alienees, is concurrent with that given to Courts of Law by chap. 46, secs. 44, *et seq.* of the Rev. Code. *Humphrey v. Wade*, 280.
2. Statutes which merely give affirmatively jurisdiction to one Court, do not oust that previously existing in another Court. *Ibid.*

See "Executors, etc.," 7, 10.
"Guardian, etc.," 8.

JURISDICTION—*Continued.*
"Justices of the Peace," 4.
"Probate Courts," 4.
"Superior Courts," 2, 3.

JURY.
See "New Trial," 6.

JUSTICES OF THE PEACE.
1. The distribution of judicial powers by Art. IV of the Constitution, is a virtual repeal of all laws giving jurisdiction to Justices of the Peace in case of forcible entry and detainer, except for the binding of trespassers to the Superior Court to answer a criminal charge. *Therefore,* where four or more men enter upon the premises in the actual possession of another, by virtue of a warrant and proceedings before a magistrate, which are a nullity, and eject such person and his family from the house they were occupying, they are guilty of a forcible trespass. *State v. Yarborough,* 250.
2. The Act of 1868-'69, chap. 178, by which Justices of the Peace were given jurisdiction finally to try certain petty assaults under certain circumstances, was repealed by the act of 1870-'71, chap. 43, which says that in all cases of assault the punishment may be by fine or imprisonment, or both, at the discretion of the Court. *State v. Heidelburg,* 496.
3. The Constitution, Art. IV, sec. 33, gives Justices jurisdiction of criminal matters arising in their counties when the punishment *cannot* exceed a fine of fifty dollars, or imprisonment for one month. When the Legislature removed this limitation and left it discretionary with the Court to exceed that limit, it took away the jurisdiction of Justices of the Peace over the offense. *Ibid.*
4. A Justice of the Peace has no jurisdiction of proceedings of forcible entry and detainer under Rev. Code, chap. 49. *Railroad v. Sharpe,* 509.

LABORER.
See "Contract," 8.

LABORER'S LIEN.
The lien of a laborer, who commenced work in January, 1873, attaching by virtue of the provisions of the Act of 1868-'69, chap. 206, sec. 9, is not divested in favor of the lien created by the Act of 1872-'73, chap. 133, sec. 1, ratified 1 March, 1873. as that would be impairing a vested right, as well as the obligation of a contract. *Warren v. Woodard,* 382.
See "Contract," 1.

LARCENY.
1. Larceny may be committed in a crowd or in the public streets; and where the defendant obtained possession of a hog from a stranger, claiming it as his own, and carried the hog home, altered the mark and put it in his pen with the other hogs: *Held,* it to be no error in the Judge below, to leave it to the jury to say, whether the taking was done for the purpose of

LARCENY—*Continued.*

depriving the real owner of his property, and converting the same to his own use or not; and if so done, the defendant was guilty. *State v. Fisher*, 78.

2. In an indictment for larceny, the ownership of the property stolen is charged "100 lbs. of cotton, the property of C, 100 lbs. of cotton, the property of G:" *Held*, that the objection to the indictment on account of duplicity and obscurity, would have been fatal on a motion to quash, but that the defect is cured by verdict, as provided in chap. 35, secs. 15 and 20, Rev. Code. *State v. Simons*, 348.

See "Indictment," 8.

LEASE, ENTRY AND OUSTER.

See "Ejectment," 2.

LEGACIES.

See "Sale of Land for Assets," 2.
"Wills," 1, 2, 4.

LEGISLATIVE SCALE.

See "Bills, Bonds, etc."
"Practice, Civil," 11.

LIFE ESTATE.

See "Wills," 3.

LIMITATIONS, STATUTE OF

1. In action on an account due 1st January, 1861, to which the statute of limitations is pleaded, the time during which the statute is to run, must be computed from the said 1st day of January, to the 20th day of May, 1861, and then from the 1st day of January, 1870, till the day the summons was issued., *Williams v. Williams*, 189.

2. Where the defendants, deriving title under a grant, dated in 1816, claimed up to a line from one point to another (which line was established and agreed to by all parties), exercising ownership by open and notorious acts, acknowledged and acquiesced in by those now claiming adversely, since the date of the grant in 1816, the plaintiff's claim to the *locus in quo* extending to said line, is barred by the statute of limitations. *Clark v. Wagoner*, 706.

See "Agreement," 3, 4.
"Bills, Bonds, etc.," 18.
"County Commissioners," 8.

LOANS.

See "Actions Civil," 3.
"Bills, Bonds, etc.," 7.

MANDAMUS.

See "Actions Civil," 4.
"Cities and Towns," 3.
"Counties."
"County Commissioners," 3.

MINORS.

1. Necessaries for which an infant may become liable, not only include such articles as are absolutely necessary to support life, but also those that are suitable to the state, station and degree of life of the person, to which they are furnished. *Jordan v. Coffield,* 110.

3. The plaintiff, a merchant, furnished the *feme* defendant during her infancy and just before her marriage, with certain articles, among which was her bridal outfit, and a chamber set: *Held,* that it was not error in the Judge below to charge the jury, if they believed that the articles furnished, were actually necessary and of a fair and reasonable price, the plaintiff was entitled to recover. *Ibid.*

3. The obligation of the mother is not the same as that of the father to support infant children; and the weight of authority, both in this country and in England, is against the liability of the mother to this burden, except under peculiar circumstances. *Ibid.*

MORTGAGE.

See "Deeds of Trust."

NECESSARIES.

See "Minors," 1, 2, 3.

NEGLIGENCE.

1. Plaintiff sent his cotton to defendants' gin-house to be ginned; while there, the gin with all the cotton in it was consumed, it not appearing how the fire originated: *Held,* that the destruction of the cotton by fire was not *prima facie* evidence of negligence; and further, it being shown that the defendants, during the possession of the plaintiff's cotton used ordinary care, they are not liable for its loss. *Bryan v. Fowler,* 596.

2. Where the plaintiff's horse was in his pasture, through which the defendant's road ran, and was run over in the day-time by one of the engines of defendant, it appearing on the trial that the horse, before being struck, ran some two hundred yards on the track, and that there was nothing to prevent the engineer from seeing him, that no alarm was given by the engineer until about the time the horse was run over: *Held,* that there was such negligence on the part of the engineer as would make the defendant liable in damages for the injury to the horse. *Jones v. R. R.,* 626.

See "Damages," 2.
"New Trial," 1.

NEW BERN, CITY OF

See "Cities and Towns," 1, 2.

NEW TRIAL.

1. In an action against a sheriff for negligence and not using due diligence in endeavoring to collect a judgment, the execution on which had been regularly placed in his hands, the defense being that the execution was held up by direction of the plaintiff; and on the trial, the jury find all issues in favor of the defend-

NEW TRIAL—*Continued.*

ant: *Held*, that it was no ground for a new trial that the jury failed to give the plaintiff nominal damages, under the instruction of the Court. *Foust v. Stafford*, 115.

2. The refusal of the Judge below to consolidate several actions brought to recover the amount of certain bills issued by a bank, the defendant, where it did not appear that the bills sued on were all of like character, and emitted under the same circumstances, was right, and the defendant was not entitled to a new trial on account of such refusal. *Glenn v. Bank*, 191.

3. It is no ground for a new trial, that the defendant's counsel made a mistake in admitting in the answer the existence of a certain contract, which mistake was not discovered until after the trial, and his Honor did right in refusing it. *Aston v. Craigmiles*, 316.

4. To vitiate and avoid a verdict, it must appear upon the record that undue influence was brought to bear on the pury. All other circumstances of suspicion address themselves exclusively to the discretion of the presiding Judge, in granting or refusing a new trial, which discretion is not a proper subject of review by this Court. *Moore v. Edmiston*, 47.

5. To give parties the benefit of the provision of sec. 299, C. C. P., allowing an appeal from an order granting or refusing a new trial, the presiding Judge should put upon the record the matters inducing the order, so that this Court can see whether the order presents a matter of law which is a subject of review, or matter of discretion which is not. *Ibid.*

6. The Court, during the trial, took a recess, when the jury separated and dispersed, the defendant not objecting, nor his Honor charging them not to do so, nor cautioning them against conversing with any one concerning the pending case: *Held*, to be no ground for a new trial. *Bullinger v. Marshall*, 520.

7. *Held, further*, that the defendant being disappointed by a witness who told him the day before the trial that he, the witness, would, if examined, give him, the defendant, a good character, and which the witness did not do, is not such a surprise as will entitle the defendant to a new trial. *Ibid.*

See "Evidence," 12.
"Practice."

NOTICE.

Since the passage of the Act of 1840 (chapter 50, Rev. Code), a purchaser of land, with notice at the time of a former fraudulent conveyance, is not protected in his purchase, although he paid value therefor. *Triplett v. Witherspoon*, 589.

See "Deeds of Trust."
"Superior Court," 3.

OFFICERS.

1. In a suit to recover damages for certain trespasses brought by one Board of Directors of a corporation against another Board, claiming to be the legally appointed Directors of the same corporation:

2. *It was held*, first, that the board *de facto* in possession of the franchises of the corporation may maintain an action for any

OFFICERS—*Continued.*

trespass respecting the corporate property; and that the acts of such *de facto* officers cannot be collaterally impeached; the proper way of trying the right or title to the office being by an action in the nature of a *quo warranto*: *Held*,, second, that the defendants could not justify such alleged trespasses under color of proceedings had by a Justice of the Peace under the provisions of the Revised Code, chap. 40 (Forcible Entry and Detainer), as the Justice in such case had no jurisdiction. *Railroad v. Johnston*, 348.

3. Courts of justice not only redress fraud, but seek to redress fraud by removing temptation. Therefore presidents and directors of railroad companies are not allowed to buy up and speculate upon claims against such companies—such contracts being in every respect against good morals, and consequently against public policy. *McDonald v. Haughton*, 393.

4. A president *de facto* of a railroad company, when a suit is pending in which his right to the office is to be tried, and just before the decision of such suit, has no right to make a distribution of the funds of the company to such creditors as he may elect to give preference. *Walker v. Flemming*, 483.

5. For the ordinary purposes of the company, and in order to keep the machinery in motion, a *de facto* president will be recognized as having power to act. *Ibid.*

See "Actions Civil," 4, 5, 6.

OFFICIAL BONDS.

The successor of a former Clerk and Master, who received bonds given for the purchase of certain lands sold by the former, collected the same and misapplied the proceeds, is liable therefor on his official bond, although there was no order for the former Clerk and Master to hand over such bonds to him. *Alexander v. Johnston*, 293.

PARTNERS.
See "Trusts."

PAYMENT.

1. In a suit on a note, the payment of which is relied on as a defense, one of the defendants testified that at the time the note was made, it was agreed that it was to be paid in certain goods, and that the defendants delivered the goods to their agent, to be delivered to a firm, of which the payee was a member, according to such agreement; and the agent testified that he sold and delivered the goods to the firm on the usual time of thirty days, nothing being said about the note: *It was held*, that this was *some* evidence of payment, which ought to have been submitted to the jury, and that his Honor below erred in charging that there was *no* evidence of payment. *Carson v. Lineburger*, 1, 3.

2. Where a debtor owes several debts to a creditor and makes payments, he may appropriate such payments to any of the debts he pleases; if, however, he fails to do so at the time, the creditor may appropriate them as he pleases, at any time before suit brought. *Jenkins v. Beal*, 440.

PAYMENT—*Continued.*

3. *Therefore,* where such debts are partly secured by a mortgage of personal property for an amount insufficient to pay all the debts, and the debtor makes no application of his payments as they are made, the creditor is at liberty to appropriate such payments to such part of the debts as is unsecured, and to hold the property mortgaged liable for the unpaid balance. *Ibid.*

See "Bills, Bonds, etc.," 10, 15.
"Receipt."

PERJURY.

1. In an indictment for perjury, the question whether or not one of the parties charged with an affray in the indictment, upon the trial of which the oath alleged as false was taken, retreated "thirteen or twelve paces," being surplusage, so too, is the question whether or not, one of said parties was stricken "two or three times," before striking the other party, the number of times being surplusage, where an averment of a blow would have sufficed. *State v. Bobbitt,* 81.

2. An averment, that the defendant "deposed and gave in evidence to the jury wilfully and corruptly," amounts to a charge that he *swore* wilfully and corruptly. *Ibid.*

3. A traverse in an indictment, pursuing the words of the defendant in taking the oath, is sufficient in an indictment for perjury. *Ibid.*

PLEADING.

1. The answer of a defendant in an action of slander, alleging that he did not speak the words as charged, with malice, etc., but that he believed them to be true, stating his reason for such belief; and further, that he did not admit that the words alleged to be slanderous were spoken within six months of the time of bringing the action, amount under our liberal system of pleading, to the pleas of justification, and the statute of limitation. *Moore v. Edmiston,* 510.

2. In an action, of the nature of a bill in equity to surcharge and falsify an account taken under a decree in a former suit, if the allegations of the complaint, upon which the plaintiff bases his equity to have such account and settlement re-opened, are denied in the answer, so that material issues of fact or law are raised by the pleadings, such issues of fact must be tried before a motion of the plaintiff to re-open the account can be entertained. *Houston v. Dalton,* 662.

3. When the allegations of a complaint present a case of equitable jurisdiction, as in an action to surcharge and falsify an account, such action is properly instituted in the Superior Court. *Ibid.*

4. The joinder of a motion to amend, by restoring a part of the record in an old equity suit for partition and sale, with a prayer for relief by the correction and re-execution of a deed, is a good ground for demurrer, which is, however, waived, if the demurrer is not filed in apt time. *Long v. Fish,* 647.

5. The amendment may be made by a motion, after notice, in the original cause, to the Judge of the Superior Court, who exer-

PLEADING—*Continued.*

cises the jurisdiction heretofore exercised by the Judge of the Courts of Equity. *Ibid.*

6. Where the allegations in a complaint (praying the correction and re-execution of a deed) that the fee-simple in the land was sold and brought a good price, and that by mistake the word "heirs" was omitted and the seal of the Clerk and Master was not affixed, are not controverted in the answer, or where the answer as to such allegations is so obscure and meaningless as to have no legal effect, and to amount only to a "sham plea," the presiding Judge was right in refusing to submit the issues of fact to the jury, and in adjudging that the correction should be made. *Ibid.*

See "Attachment."
"Claim and Delivery, etc."
"County Commissioners, 4, 5, 6.
"Injunction," 1, 2.
"Tenant by the Courtesy," 1, 2.

PRACTICE—CIVIL CASES.

1. There are three modes of trial provided for by the Code:
   1. Trial by jury.
   2. Trial by the Court.
   3. Trial by referees. *Green v. Castlebury,* 20.
2. If a reference is made by consent, it is a mode of trial selected by the parties, and is a waiver of the right of a trial by a jury. *Ibid.*
3. If no exceptions be taken before the referees, and their report go up without exceptions, and either party desire to except, then and there in term time, he must be permitted to do so. And then his Honor must pass upon them as if they had been taken before the referees. *Ibid.*
4. Where a report is made under a compulsory reference, and exceptions are filed, and issues made by these exceptions, either party has the right to have the issues tried by a jury; because, not having waived a trial by jury, as is done when the reference is by consent, the party has a constitutional right to a trial by jury. Section 246, C. C. P., construed, and the practice under the same settled and fully explained. *Ibid.*
5. In a case of compulsory reference, either party may, at some stage of the proceedings, to be determined by the Court, demand a trial by jury of the issues arising in the report of the referee. But if the reference has been made by consent, the parties waive their right to have such issues tried by a jury, and cannot demand it, after having by such waiver renounced it. (RODMAN, J., dissenting.) *Armfield v. Brown,* 27.
6. The Act of 1866-'79, chap. 59, sec. 2, is repealed by the Act of 1868-'69, and by chap. 121, Bat. Rev., so that a jury trial upon certain issues cannot under the provisions of the act be now demanded. *Lippard v. Roseman,* 34.
7. Parties are entitled to a jury trial in all cases when they have not waived their right to demand it, as they have by a reference by consent. *Ibid.*
8. In a petition for a *certiorari,* as a writ of false judgment, it must be affirmed or shown that a judgment was rendered; if the *cer-*

PRACTICE—CIVIL CASES—*Continued.*

tiorari is applied for as a substitute for an appeal, the party must show that he has been improperly deprived of his appeal, or has lost it by accident. *Barton ex parte*, 154.

9. The Acts of 1870-'71, chap. 42, secs. 1 and 2 (Bat. Rev., chap. 18, secs. 1 and 2), and of 1871-'72, chap. 45, do not change the *venue* of any action; and therefore actions against a Board of County Commissioners must be brought in the county of such Commissioners. *Steele v. Com.*, 137.

10. An order of Court, sending back a report to a commissioner or referee, is sufficient notice to the party excepting to such report, of its recommitment. *Herring v. Murphy*, 164.

11. A commissioner in applying the scale of depreciation to payments and receipts, applied the same at the date the several payments were made and the receipts given: *Held*, to be proper and no ground of exceptisn, in the absence of proof that the party kept on hand the identical money received. *Ibid.*

12. A commissioner reports that the evidence upon which he stated the account, "was the reports of the defendant as guardian to the Court, one voucher for defendant (which is allowed), and defendant's affidavit:" *Held*, that was a sufficient statement of the evidence to justify a confirmation of the report. *Ibid.*

13. The presiding Judge, under the old Equity practice, might or might not submit issues to a jury, as he saw fit; and might sustain or disregard the finding of the jury on such issues as he thought best. *Pearson v. Caldwell*, 291.

14. If an appellant fails to assign and prove an error, the judgment, although erroneous, must be affirmed. *Utley v. Foy*, 303.

15. In our practice, the Judge below is not required to recapitulate the testimony given in on a trial before him a *second* time, although one of the parties may request it to be done. *Aston v. Craigmiles*, 316.

16. The proper practice in a proceeding against an administrator, who at the time was Judge of Probate, seems to be to make the summons returnable before him, and then, under the provisions of the Act of 1871-'72, chap. 197, transfer the whole proceedings before the District Judge, who will make the necessary orders in the premises. *Wilson v. Abrams*, 234.

17. Exceptions to the report of a referee, that he adopted a former settlement as the foundation of his report; that he stated no evidence upon which he found the facts reported; that he filed no vouchers nor receipts, nor did he refer to any authorizing the disbursements reported; and that he did not state when certain judgments were obtained, are all well taken, and the report was properly set aside. *Ibid.*

18. When issues are made up by the pleadings, parties have the right to have those material to the determination of the case submitted to a jury; and for the presiding Judge to withdraw such material issues and substitute others, is error. *Albright v. Mitchell*, 445.

19. When the Judge below does not find the facts upon which he overruled the defendant's exceptions, and the defendant not having requested him to find such facts, this Court will re-

PRACTICE—CIVIL CASES—*Continued.*

mand the case that the facts may be found either by his Honor, or in a *case* under the Code. *Froneberger v. Lewis,* 456.

20. All questions of practice and procedure as to amendments and continuances arising on a trial in the Court below, are in the discretion of the presiding Judge, from whose judgment thereon there is no appeal. *Austin v. Clarke,* 458.

21. When, in his complaint, the plaintiff demands unliquidated damages, there must be an enquiry to ascertain the amount thereof. *Mayfield v. Jones,* 536.

22. The presiding Judge, on a trial in the Court below, has the power to allow or refuse amendments to the pleadings. *Wall v. Fairley,* 537.

23. Whenever a party is put out of possession by process of law, and the proceedings are adjudged void, an order for a writ of restitution is a part of the judgment, and should be made. *Perry v. Tupper,* 538.

24. In a petition to rehear, it should appear either that there is error of law apparent on the record, or that testimony has been newly discovered which would materially vary the case. That no pleadings have been filed in a cause before the Probate Court, and that evidence of the witnesses was not taken by question and answer, and signed, are no such grounds of error of law as will entitle a party to have the cause reheard after final judgment, especially when it appears that such party had every opportunity for a full defense and of an appeal. *Williams v. Williams,* 665.

25. A rehearing is not a matter of right, but rests in the sound discretion of the Court where the parties to a final judgment fail to appeal by their own default. *Ibid.*

See "Appeal."
"Arbitration," etc., 1, 2.
"Executors," etc., 7.

PRACTICE—CRIMINAL CASES.

1. A motion in arrest of judgment rests on error upon the face of the record, and any statement of the case by counsel tends to confuse instead of aid the Court, who are obliged to examine the whole record and pronounce judgment according to the very rights and merits apparent thereon. *State v. Bobbitt,* 81.

2. In criminal trials against two or more defendants the Judge has the right in his discretion to separate the evidence bearing upon the case of each and to instruct the jury as to what is competent against one and incompetent against another. *State v. Collins,* 241.

3. In trials for capital felonies the presiding Judge has the right to regulate by reasonable rules and limitations the arguments in the cause: *Hence,* it is no good ground for a new trial that the counsel of the prisoner was limited by the Court in his remarks to one hour and a half. *Ibid.*

4. When several persons are jointly indicted they cannot claim separate trials as a matter of right. Such separation is a matter of discretion with the Court. *Ibid.*

PRACTICE—CRIMINAL CASES—*Continued.*

5. It is no good cause of challenge that the juror has formed and expressed an opinion adverse to the prisoner, such opinion being founded on rumor and the juror further stating that he could try the case according to the law and evidence, uninfluenced by any opinion he may have so formed from such rumor. *Ibid.*

6. It is not necessary that a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried. *State v. Ketchey*, 921.

7. Because of a juror's being first cousin to the prisoner is no good cause of challenge by the prisoner, unless it be shown that ill-feeling or bad blood exists between the juror and the prisoner. *Ibid.*

PRESIDENT DE FACTO.

See "Officers," 4, 5.

PRIORITY.

See "Executors and Administrators," 11.

PRIVATE EXAMINATION.

See "Deeds," 1, 2.

PROBATE COURTS.

1. In a proceeding to subject real estate to sale for assets, after a report of the sale is returned and confirmed the Judge of Probate, upon proper cause shown, has the right to set the sale aside and order a resale of the property. *Lovenier v. Pearce*, 167.

2. And, although the exercise of this right is discretionary with the Judge of Probate, still it is such a matter of legal discretion, involving a "matter of law or legal inference," that an appeal will lie from his decision. *Ibid.*

3. There are *questions* of fact as distinguished from *issues* of fact which the Probate Judge in cases before him, and the District Judge in cases before him, may decide without a jury. And, in a motion made to set aside a sale, it is not necessary for the Judge in case of appeal to send to the appellate Court a separate statement of the facts upon which his decision rests when the affidavits and counter-affidavits for and against the motion accompany the case. *Ibid.*

4. Courts of Probate have original jurisdiction of special proceedings for the recovery of distributive shares and legacies which have not been assented to by the executor. When, however, actions for the same have been brought to regular terms of the Superior Courts the defect is cured by the Act of 1870-'71, chap. 108 (Bat. Rev., chap. 17, secs. 425, 426). *Bell v. King*, 330.

See "Guardian and Ward," 8.
"Practice, Civil," 16, 24.

PROMISSORY NOTES.

See "Bills, Bonds and Promissory Notes."

PUBLIC PRINTER.

The Act of 1869-'70, chap. 43, repeals the act establishing the office of Public Printer, and the Public Printer, as now provided for, is not an officer within the meaning of the Constitution. *Brown v. Turner*, 93.

QUO WARRANTO.

See "Actions, Civil," 4.
"Officers," 2.

RAILROAD COMPANIES.

(Stock in.) See "Actions, Civil," 3.
(Stock in.) See "Cities and Towns," 4.
("Negligence.") See "Negligence," 2.
See "Officers," 1, 2, 4, 5.

RECEIPT.

A receipt for a certain sum in payment of a lost or mislaid note discharges only so much of said note as such receipt amounts to. *Witherington v. Phillips*, 444.

RECORDS.

See "Evidence," 6.
"Guardian and Ward," 6.

REFERENCE AND REFEREES.

See "Practice, Civil," 1, 2, 3, 4, 5, 10, 17.

REGISTRATION.

See "Deeds of Trust."

REHEARING.

See "Practice," 24, 25.
"Supreme Court," 3.

REWARDS.

A person applying for and receiving from a sheriff a warrant and special deputation to arrest a fugitive from justice, and who executes the warrant and delivers to the sheriff the person arrested, is not entitled to the reward offered by the Governor for the apprehension of such fugitive. *Malpass v. Governor*, 130.

RIOT.

See "Indictment," 1.

ROADS.

1. An order issued by the township board of trustees appointing a person overseer of a road is proper evidence of such appointment and is admissible. *State v. Cauble*, 62.
2. Section hands employed on our railroads at regular wages are not thereby excused from working on the public highways of the county. *Ibid.*

SALE OF LAND.

See "Contract," 10, 11.
"Executors," etc., 17.

SALE OF LAND FOR ASSETS.

1. Where a tract of land upon which a widow had dower was sold for the purpose of making assets to pay debts by the administrator of the husband, in two separate parts, and she bid off both parts at unequal prices, and the sale was set aside as to the cheaper part: *It was held,* that she had the right to have the sale set aside as to the other part also, where it appeared that she would not have purchased the former part unless she could have got the latter with it. *Davis v. Cureton,* 667.
2. In an application to sell land to pay debts by an administrator *de bonis non,* with the will annexed, when it appears that the first executor assented to and paid the legacies of the testator's personal property without paying the debts, and that such executor had given a bond for the faithful administration of the assets of his testator, one of the sureties on said bond being at the time of the application solvent, and that the personal property left by the testator was sufficient to pay his debts: *Held,* that the administrator *de bonis non,* etc., must first sue on the bond of the executor before he can obtain a license to sell the real estate, and that the order directing a sale at this time was erroneous. *Carlton v. Byers,* 691.

See "Agreement," 3, 4.
"Execution," 1, 2.
"Executors," etc., 17.
"Probate Court," 1.
"Sheriff's Sale," 2.

SET-OFF.

See "Counter-claim."

SHERIFFS.

1. Whenever a sheriff into whose hands an execution is placed levies the same and advertises a sale, he becomes entitled to his commissions; and if the plaintiff in the execution receives the amount from the debtor and orders the same to be returned unexecuted, he makes himself liable for the sheriff's fees. *Willard v. Satchwell,* 268.
2. A sheriff who advertises a sale of land, levied upon under execution, to take place on Monday, the first day of the term, as prescribed by law, which sale is postponed from day to day, has a right to sell the same on the Friday succeeding. *Wade v. Sanders,* 270.
3. A rule on a sheriff to show cause why he has not obeyed the mandate in an execution and sold certain land and the reversionary interest therein is well answered by showing that the land had been assigned as a homestead and by pleading the Act of 1870-'71, forbidding the sale of the reversionary interest, and the rule must be discharged. *Jones v. Wagoner,* 322.
4. Until his fees are paid or tendered, a sheriff is not bound to execute process. *Johnson v. Kenneday,* 435.

See "New Trial," 1.
"Reward."

SHERIFF'S DEED.

See "Evidence," 13.

SHERIFF'S SALE.

1. In 1831, and before, in order to subject land to the payment of debts, there was, in the first place, a judgment against the personal representative fixing the debt, and, in the second place, a *sci. fa.* setting out the judgment and calling upon the heirs to show cause why execution should not issue against the land which had descended. *Therefore,* a purchaser at a sheriff's sale under an execution unsupported by such judgment and *scire facias* obtains no title. *Crawford v. Dalrymple,* 156.
2. A purchaser of land from one claiming the same under a deed declared by the jury to be fraudulent stands on no better footing than such fraudulent donee himself; nor can the deed of such purchaser have any other or greater effect than the deed declared to be fraudulent, except such purchase was for a valuable consideration and without notice of the fraud attempted to be perpetrated. *Wade v. Saunders,* 270.
3. A bidder for land sold under an execution in his favor, and who received the proceeds of such sale, is not thereby estopped from showing in a subsequent and different proceeding that the land belonged to some one else other than the defendant in his execution. *Ibid.*
4. A purchaser at a sheriff's sale, as against the defendant in the execution who withholds possession, is entitled to recover as of course; and the debtor cannot justify his act of refusing to give up the possession on the ground of the title being in a third person. *Ibid,* 277.

See "Judgment."
"Sheriffs," 2.

SLANDER.

See "Pleading."

SPECIFIC PERFORMANCE.

See "Bills, Bonds," etc., 12.

SPECIAL TERM.

See "Practice, Criminal," 6.
"Superior Courts," 4.

STOCK.

(Subscription to.) See "Cities," etc., 4.
(Subscription to.) See "County Commissioners," 5, 6, 7.

SUBROGATION.

See "Executors," etc., 12.
"Surety," 2.

SUPERIOR COURTS.

1. The Superior Courts have the power to amend a warrant issued by a justice of the peace against a person refusing to work the road by inserting the State as plaintiff instead of the overseer. *State v. Cauble,* 62.
2. The Superior Courts in term time have, under the Act of 1872-'73, chap. 175, jurisdiction of actions by creditors against administrators. *Johnson v. Davis,* 581.

SUPERIOR COURTS—*Continued.*

3. The Court below has no power to allow an amendment to an execution so as to divest the title acquired by a subsequent innocent purchaser without notice. *Williams v. Sharpe*, 582.

4. Chap. 272, 1868-'69, and the act amendatory thereof, chap. 15, 1871-'72, authorizing the Governor of the State to appoint special terms of the Superior Courts, are not unconstitutional; and in appointing such special terms the Governor is not bound by the certificate of the Judge so far as to confine such terms to the trial of a particular class of cases. *State v. Ketchey*, 621.

SUPREME COURT.

1. The Supreme Court has no jurisdiction under the Constitution to consider the evidence and review the finding of the Court below in regard to facts as well as in regard to "legal inference," whether such issues of fact are tried by the Judge or by a jury, or are made by the pleading, as under the old system, or are eliminated by the Court from complaint and answer, or by means of exceptions to a report. *Keener v. Finger*, 35.

2. The Supreme Court has no power to compel by process of attachment a defendant to pay a judgment against him for costs recovered by a plaintiff in this Court. *Phillips v. Trezevant*, 176.

3. A party plaintiff has no right to have a decree reheard by which certain lands were directed to be sold (and which afterwards confirmed the sale), when such party is in no way interested in the proceeds of sale and did not ask a sale in her original complaint. *Hinton v. Hinton*, 730.

See "Practice."

SURETY AND PRINCIPAL.

1. The surety on a bond is entitled to all the legal and equitable defenses to which his principal is entitled which attached to or was connected with the debt evidenced by such bond; and it is competent for such surety to introduce any evidence tending to set up such defense; for instance, to prove a set-off or counterclaim contracted in reference to the debt sued upon. *Jarratt v. Martin*, 459.

2. A surety of a judgment debtor has an equity to be subrogated to the rights of his creditor when it has been agreed by several creditors of the same debtor that his land should be sold, although conveyed before their executions became liens, and the proceeds of such sale should be divided in proportion to the amounts of their judgments; the judgment of the creditor whose debt was secured being credited with his interest in the proceeds of the sale, so as to diminish the amount to be paid by the surety. And if this agreement, as alleged in the complaint, is denied or controverted by the answer, issues must be made and submitted for the purpose of establishing said agreement before the equities of the plaintiffs can be declared. *Perry v. Perry*, 697.

See "Abatement," 1.
"Executors," etc., 12.

TAXES.

1. The provision of section 6 (7), Art. V, of our State Constitution, restraining county commissioners from levying a tax more than double the amount of the State tax, does not apply to taxes levied to pay debts against the county existing at or before the adoption of the Constitution. *Haughton v. Comrs.*, 466.
2. The equation of taxation provided for in Art. V, sec. 1, does not apply to taxes to pay a public debt existing at the adoption of the Constitution, or for special county purposes, nor does section 7 of the same article, forbidding counties to levy more than double of the State tax, apply to such debts. *Street v. Comrs.*, 644.
3. There is nothing in the Constitution of the State which prohibits the commissioners of a county from taxing polls to pay a county debt incurred before 1868; and there is nothing in that instrument fixing a maximum of taxation for such purpose. *Brothers v. Comrs.*, 726.

See "County Commissioners," 7.

TENANT BY THE CURTESY.

1. A tenant by the curtesy initiate has a right to sue alone for the possession of his wife's land and for damages for the detention of it. *Wilson v. Arentz*, 670.
2. A complaint by a husband which states that he was married to his wife in 1841, that he had by her several living children, and that she acquired the land in question by a deed executed to her in 1844, is sufficient to show his title as tenant by the curtesy initiate of the land; and the fact that the Act of 1848 (Battle's Rev., chap. 69, sec. 43) deprives him of the power to lease the land without the consent of his wife will not prevent his recovery of the land by an action under the C. C. P. without joining his wife as a party. *Ibid.*

See "Husband and Wife," 2.

TENDER.

1. A promissory note payable in Confederate currency in 1863 is a contract to pay *money*, and not a contract to deliver specific articles: *Hence*, a tender of the money at the day does not satisfy the debt, but only stops the interest. *Bank v. Davidson*, 118.
2. In an action upon such note, where the money tendered had been refused: *It was held*, that although the defendant need not bring into Court the Confederate money, now worthless, he should have accompanied his plea by a payment into Court of the statutory equivalent for such Confederate money: *Held further*, that the plaintiff was entitled to interest from the date of the service of his summons. *Ibid.*
3. A tender of Confederate money, to be valid to stop interest, should be accompanied with an offer to pay the scaled value of the note or claim sued upon; otherwise interest will run from the demand of payment or from the time the process in the action is served. *Tate v. Smith*, 685.
4. Where it was found on the trial below that the defendants were ready, able and willing and offered to pay in Confederate money the amount of two notes due the plaintiff soon after they fell

TENDER—*Continued.*

due in February, 1864, which offer was refused: *Held*, that the offer to pay stopped the interest from the time it was made until the date or service of the summons in the action brought to recover the notes. *Bank v. Stenhouse*, 703.

TITLE.

See "Statute of Limitations," 2.

TRESPASS.

See "Cities and Towns," 7, 8.
"Officers," 2.

TRIAL.

See "Practice, Civil," 1, 4, 5, 7, 13, 18, 21.
"Practice, Criminal," 4.

TRUSTS.

A purchase by a man in his own name with funds in his hands of a fiduciary nature creates a resulting trust in favor of those whose money is employed in the purchase. *Therefore*, where land has been purchased with partnership funds, although it be conveyed to one partner only, yet it becomes partnership property. *King v. Weeks*, 372.

(Verbal.) See "Evidence," 1.

VENUE.

See "County Commissioners," 2.
"Practice."

VERDICT.

See "New Trial," 4.

WILLS.

1. A testator directed, after giving some pecuniary legacies to certain grandchildren which was a charge upon the whole of his estate, that his "real and personal property remain as a common stock for the family that now make their home here, subject, nevertheless, to any distribution which my executors hereinafter named may think proper to make": *Held*, that all the living children of the testator and the representatives of the deceased children are tenants in common of all the real and personal estate, with partition postponed until circumstances should make it necessary. The separation of the family and the death of some, and the sale of the interest of one, thereby letting into the family a new and disturbing element, is such a change of circumstances as makes a partition proper. *Dickson v. Dickson*, 487.
2. When a legacy is given to a class, as to the children of ......, with no preceding estate, such only as can answer to the call at the death of the testator can take, for the ownership is then to be fixed and the estate must devolve upon those who answer the description. *Walker v. Johnston*, 576.
3. When, however, there is a preceding life estate, so that the ownership is filled for the time and there is no absolute necessity to

WILLS—*Continued.*

make a peremptory call for the takers of the ultimate estate, the matter is left open until the determination of the life estate with a view of taking in as many objects of the testator's bounty as come within the description and can answer to the call when it is necessary for the ownership to devolve and be fixed. *Ibid.*

4. A legacy to A, who was *nullius filius*, and who died intestate without children, does not go to the brothers and sisters of his mother, but escheats to the University. *Ibid.*

WITNESSES.

1. Tickets given out by Clerks of Superior Courts in State cases are only evidences that the witnesses attended; and until the Judge by whom the case was disposed of shall pass upon the costs, including witness fees, and declare how, when and by whom such costs shall be paid, the county commissioners cannot know their liability and are not responsible therefor. *Moore v. Comrs.*, 340.
2. A defendant who offers himself as a witness in his own behalf may be asked if he has not disposed of his property so as to avoid the payment of any recovery in the action then being tried; and if, since such disposal, he has not been engaged in selling the same property, and his answers are proper subjects for comment before the jury. *Lassiter v. Phillips*, 462.
3. Is is also competent to ask such witness if he had not gone to New York to consult a spiritualist in regard to the money, the subject of the present controversy. *Ibid.*
4. A plaintiff who, as a witness, relates a conversation he had with the defendant, which is by the defendant contradicted in a material particular, can corroborate his testimony by showing by another witness that he made substantially the same statement to that witness, soon after the conversation occurred, as he made on the trial. *Bullinger v. Marshall*, 520.
5. A witness may be allowed to express his opinion as to the state of mind of another witness during certain periods; and it is not necessary that such witness should be an expert or a physician. *State v. Ketchey*, 621.

See "Evidence," 3.
"New Trial," 7.

WRIT OF RESTITUTION.
See "Practice," 23.

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